THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Jennifer B. McCoy, Circuit Court Judge
Charleston County

Appellate Case No. 2024-001612
Trial Court Case No. 2022-CP-10-04219

1001 Harborview, LLC — Appellant,

v.

Phillip Tran and Quyen Tiet — Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court abuse its discretion in denying Appellant's requested damages based on an erroneous assessment of Appellant's duty to mitigate?
2. Did the trial court abuse its discretion in refusing to award Appellant damages equal to all payments due and to become due as provided for in the Lease?
3. Did the trial court's conduct during the default damages hearing constitute an abuse of discretion when it allowed Ms. Tiet to dispute liability and contradicted the admitted facts of the Complaint?
4. Did the trial court abuse its discretion in reducing Appellant's attorneys' fees without addressing any of the required *Blumberg* factors?

STATEMENT OF JURISDICTION

This case originated in the Court of Common Pleas for the County of Charleston. Jurisdiction was proper. Appellant 1001 Harborview, LLC appealed the Court of Common Pleas' partial grant of Appellant's motion for default damages to the South Carolina Court of Appeals. This Court has jurisdiction over this matter as it does not lie within any of the seven classes of cases that the South Carolina Supreme Court exercises exclusive jurisdiction over pursuant to S.C. CODE ANN. §14-8-200(a)-(b). Therefore, the South Carolina Court of Appeals has jurisdiction over this case and controversy.

STATEMENT OF THE CASE

On or about December 22, 2021, Appellant, 1001 Harborview, LLC ("Appellant" or "Landlord"), and Respondents, Philip Tran ("Mr. Tran") and Quyen Tiet ("Ms. Tiet") (collectively, "Respondents" or "Tenants"), entered into and executed the certain retail lease agreement (the "Lease") for the premises located at 5060 Dorchester Road, Unit 360, North Charleston, SC 29405 (the "Premises"). (R. 0063-0090). Around the same time, Respondents entered into other leases with Appellant for different commercial spaces. (R. 0043, lines 4-6). Under the Lease, rent payments were to commence June 1, 2022 and end on June 1, 2032. (R. 0063-0090). Unfortunately, Respondents failed to pay Minimum Rent or Additional Charges as they became due on June 1, 2022, and made no payments to Appellant thereafter for the months

of July 2022 and August 2022. (R. 0020, pp. 13). Additionally, Respondents abandoned the Premises and, upon information and belief, their equipment that they had purchased from the previous tenant for about One Hundred Thousand and 00/100 Dollars ($100,000.00). (R. 0043, lines 21-24); (R. 0044; lines 4-8). On July 18, 2022, Appellant provided Respondents with notice of their default in rent and Appellant's intention to terminate the Lease. (R. 0091-0093). Although, Appellant stated that it would make efforts to relet the Premises to mitigate its damages, Appellant reminded Respondents that the termination of the Lease does not release them from their obligations. (R. 0091-0093).

On September 9, 2022, Appellant filed its Summons and Complaint in Charleston County in the Court of Common Pleas. (R. 0016-0022). In its Complaint, Appellant alleged two causes of action: Declaratory Judgment and Breach of Contract. *See* (R. 0016-0022). Appellant's Summons and Complaint were properly served on Respondents on September 14, 2022. (R. 0094-0097). On October 25, 2022, Appellant filed its Motion for Entry of Default, as neither Respondents filed any responsive pleadings or otherwise appeared. (R. 0023-0025). On October 26, 2022, the Court of Common Pleas Ordered Entry of Default against Respondents. (R. 0001-0002).

On September 6, 2023, the Court of Common Pleas held a hearing on Appellant's damages. (R. 0003). For the first time, Ms. Tiet appeared with counsel, Lawrence M. Hershon, Esq. (R. 0003). On September 15, 2023, Appellant's counsel submitted the Affidavits of Attorneys' Fees and Appellant's Affidavit of Damages. (R. 0059-0060), (R. 0061-0062), (R. 0054-0058). Appellant initially sought damages from Respondents for the following: (i) Two Million Two Hundred Nine Thousand Nine Hundred Sixty-Eight and 00/100 Dollars ($2,209,968.00) in Minimum Rent; (ii) Seven Hundred Twenty Thousand and 00/100 Dollars ($720,000.00) in Additional Charges; (iii) One Hundred Forty-Six Thousand Four Hundred Ninety-Eight and

40/100 Dollars ($146,498.40) in late fees; and (iv) Eight Thousand Three Hundred Fifty-Seven and 19/100 Dollars ($8,357.19) in Attorneys' Fees and Costs. (R. 0057-0058, pp. 20).

On January 30, 2024, the Court of Common Pleas entered its Order on damages, awarding Appellant Fifteen Thousand and 00/100 Dollars ($15,000.00) in damages, which is less than one month's Minimum Rent payment under the Lease, and Three Thousand and 00/100 Dollars ($3,000.00) in attorneys' fees and costs, which is thirty-six percent (36%) of the requested amount. (R. 0008). On February 9, 2024, Appellant filed its Motion to Reconsider this award and submitted its Memorandum in Support of its Motion. (R. 0026), (R. 0027-0034). In Appellant's Memorandum in Support of its Motion to Reconsider, Appellant informed the trial court that it was able to successfully mitigate its damages by entering into a lease with a new tenant on September 8, 2023, two days after the damages hearing. (R. 0031). Although Appellant was involved in negotiations with the new tenant at the time of the damages hearing, there were still some contingencies in the lease that needed to be satisfied after the lease was executed. (R. 0031-0032). Rental payments commenced under the new lease on January 15, 2024 at a rate of $13.15 per square foot, thus reducing the total damages caused by Respondents to Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032). However, on September 9, 2024, Appellant's Motion to Reconsider was denied. (R. 0013-0015).

Appellant timely filed its Notice of Appeal to this Court on September 23, 2024.

STANDARD OF REVIEW ON APPEAL

The appellate court's review of a damages award is limited to the correction of errors of law because the trial court has considerable discretion regarding the amount of damages. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 348, 907 S.E.2d 129, 140 (Ct. App. 2024). In reviewing a damages award the appellate court's task is to determine if there is any evidence to support the damages award. *Id*. at 348, 907 S.E.2d at 140.

When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Baron Data Sys., Inc. v. Loter,* 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Kiriakides v. Sch. Dist. Of Greenville Cnty*., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009).

ARGUMENT

I. The Court should reverse the trial court's reduced award of Appellant's damages because the reduction was based on an erroneous assessment of Appellant's duty to mitigate damages.

The trial court abused its discretion in finding that Appellant failed to mitigate its damages, as South Carolina law requires only reasonable efforts to re-let the premises at market value, and Appellant's actions—actively marketing the property, engaging brokers, and rejecting commercially unreasonable offers—satisfied this standard. It is undisputed that under South Carolina law, landlords have a duty to mitigate damages when a tenant defaults on a commercial lease. *See U.S. Rubber Co. v. White Tire Co*., 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956) (recognizing that a landlord who terminates a lease for the tenant's nonpayment of rent has a duty to mitigate his damages). This duty obligates landlords to make reasonable efforts to re-let the premises and offset financial losses caused by the tenant's breach.

South Carolina case law, along with persuasive authority from other jurisdictions, establishes a "reasonableness" standard for mitigation efforts, allowing landlords to protect the financial integrity of their properties while still fulfilling their legal obligations. For example, the South Carolina Supreme Court in *Burkhalter v. Townsend* held that landlords had a duty to minimize their damages as far as they could reasonably do so. *Burkhalter v. Townsend*, 139 S.C.

324, 332, 138 S.E. 34, 37 (1927). Additionally, in *Moore v. Moore* the Court of Appeals established that a defendant who claims a plaintiff's damages could have been mitigated has the burden of proving that mitigation is possible and reasonable. *Moore v. Moore*, 360 S.C. 241, 262, 599 S.E.2d 467, 478 (Ct. App. 2004).

A. The duty to mitigate damages did not require Appellant to unreasonably exert itself by accepting offers below fair market value.

The trial court abused its discretion in reducing Appellant's damages award because Appellant's duty to mitigate did not require the acceptance of offers to re-let the Premises at half the fair market value, or on terms that were commercially unreasonable. South Carolina courts focus on reasonableness, no more and no less, in mitigation efforts. For example, in *Hunter v. Southern Railway*, the South Carolina Supreme Court recognized that the efforts required by the injured party in a breach of contract must be determined by the rules of common sense and fair dealing. *Hunter v. S. Ry*., 90 S.C. 507, 512, 73 S.E. 1017, 1019 (1912). Additionally, in *Genovese v. Bergeron*, the Court of Appeals held that a party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages. *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997). However, the law does not require unreasonable exertion or substantial expense for this to be accomplished. *Id*. at 572, 490 S.E.2d at 611. Subsequently in *Moore v. Moore*, the Court of Appeals affirmed that while a party injured by the acts of another is required to do what a person of ordinary prudence would do under the circumstances, the law does not require the injured party to exert himself unreasonably or incur substantial expense to avoid damages. *Moore*, 360 S.C. at 262, 599 S.E.2d at 478. Thus, it is clear that the duty to mitigate obligates landlords to act in good faith and with commercial reasonableness.

There is also a plethora of persuasive authority from other jurisdictions that reinforce this principle of reasonableness. For example, in *Sommer v. Kridel* the New Jersey Supreme Court held that in mitigating damages, a landlord need not accept less than fair market value or substantially alter his obligations as established in the pre-existing lease. *Sommer v. Kridel*, 378 A.2d 767, 774 (N.J. 1977). Likewise, the Oregon Supreme Court in *Foggia v. Dix* held that a commercial landlord did not fail to satisfy its duty to mitigate by not making an effort to lease the premises for less than the rental amount owed under the pre-existing lease because the landlord should not be required to rent the premises below the fair market value. *Foggia v. Dix*, 509 P.2d 412, 414-415 (Or. 1973). The Oregon Supreme Court based its holding on the well-established principle that a landlord should not be required to substantially alter his obligations as set forth in the pre-existing lease. *Id*. at 414.

Similarly, in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,* the Texas Supreme Court concluded that landlords must mitigate damages through reasonable efforts but are not required to relet the premises to just any willing tenant; the replacement tenant must be suitable under the circumstances. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,* 948 S.W.2d 293, 299 (Tex. 1997). Likewise, in *Premier Consulting & Mgmt. Sols., LLC v. Peace Releaf Ctr. I*, the Arizona Court of Appeals confirmed that when a commercial landlord terminates a breaching tenant's right to possession without terminating the lease itself, the tenant remains obligated to pay rent for the entire term of the lease, but the landlord is obligated to mitigate its damages by making reasonable efforts to re-let the premises at a fair rental value. *Premier Consulting & Mgmt. Sols., LLC v. Peace Releaf Ctr. I,* 544 P.3d 658, 666 (Ariz. Ct. App. 2024). Further, if the landlord makes reasonable efforts to re-let the premises but is unsuccessful, he is entitled to the full amount of rent due under the lease. *Id*.

In an attempt to mitigate its damages Appellant listed the Premises with a commercial broker at the price $12.00 per square foot, which is the same price owed under the Lease. (R. 0047, lines 12-14). Although Appellant received two different offers to rent the Premises for $12.00 per square foot, those offers had not come to fruition by the time of the damages hearing, which was not due to any fault of Appellant's. (R. 0047, lines 20-25); (R. 0048, lines 1-6). In or around March of 2023 Appellant exercised his business judgement and rejected an inadequate offer from Piggly Wiggly to rent the Premises for $6.00 per square foot. (R. 0048, lines 7-16); (R. 0049, lines 2-4). Appellant rejecting an offer at half the fair market value was not only reasonable but prudent, as accepting such an offer would have further diminished Appellant's financial position. Additionally, Appellant continued to use reasonable efforts to re-let the Premises after rejecting the insufficient offer, such as maintaining market-rate pricing, listing the Premises with multiple brokers, and showing the Premises to prospective tenants. (R. 0038; lines 5-9); (R. 0041, lines 9-11); (R. 0045, lines 9-10); (R. 0031). As such, the duty to mitigate was wholly fulfilled.

The trial court erroneously asserts that "the obligation to take reasonable steps to mitigate damages requires not only the listing of the property so a new tenant can be signed to take the space, but also to consider having a tenant who will pay less per square foot for the space. The opportunity existed to lease the space at $6.00 per square foot." [*Emphasis added*.] (R. 0007). However, the trial court failed to cite any authority that supports this naked assertion. Moreover, the trial court's position directly contradicts the views of this Court, as established in *Genovese* and *Moore*, which recognizes that the duty to mitigate requires reasonable efforts—not measures that impose undue financial harm on the non-breaching party. Further, had Appellant accepted the below market value offer it would not have been able to secure a lease with the new tenant on September 8, 2023, at the rate of $13.15 per square foot, which ultimately reduced Appellant's

total damages to Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0031-0032).

Thus, the trial court abused its discretion holding that Appellant failed to fulfill its duty to mitigate by not accepting an offer at half the market-value of the Premises. (R. 0007-0008). The trial court's holding on this point was a flagrant error of law, was wholly unreasonable, and manifestly unjust. Therefore, Appellant respectfully requests that this Court reverse the trial court's decision and award Appellant damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

B. Appellant satisfied its duty to mitigate damages by making reasonable efforts to re-let the Premises at market value.

The trial court abused its discretion in reducing Appellant's damages award because Appellant made reasonable efforts to re-let the Premises at market value, which satisfied its duty to mitigate damages. To meet their duty to mitigate, landlords must demonstrate reasonable, good-faith efforts to re-let the premises. *See Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955) (holding that a party who has suffered damages from the actionable conduct of another has the duty to make all reasonable efforts to minimize the damages incurred). Reasonable efforts to re-let the Premises would include listing the Premises at a reasonable market rate, advertising through appropriate channels, engaging brokers, and showing the Premises to prospective tenants. This would be consistent with the South Carolina Residential Landlord and Tenant Act which requires a landlord to make reasonable efforts to rent the dwelling unit at a fair rental value after the tenant has abandoned the dwelling unit. S.C. CODE ANN. §27-40-730(c). Further, the tenant claiming that the landlord failed to mitigate its damages has the burden of proving they could have been reasonably avoided or reduced. *See Genovese*, 327 S.C. at 573, 490 S.E.2d at 611 ("the tenant failed to present any evidence showing what types of advertising would have been reasonable, how

much sooner the landlords could have rented or sold the property through other methods, or that the landlords' actions to rent the property were inadequate or improper. We conclude, therefore, the tenant failed to sustain her burden of proving the landlords could have reasonably avoided or reduced their damages.").

Unfortunately, South Carolina case law does not provide us with any case that mirrors the facts of the present case. However, there is extensive persuasive authority from other jurisdictions that are factually analogous to the present case. For example, in *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, the Texas Supreme Court confirmed that landlords are not obligated to prioritize expedience over financial prudence. *Austin Hill Country Realty, Inc.,* 948 S.W.2d at 299. Additionally, in *Wingate v. Gin*, the Arizona Court of Appeals held that a commercial landlord's efforts to re-let the premises following the tenant's abandonment were reasonable where: (i) the landlord hired a realtor, (ii) advertised the vacancy in the newspaper, yellow pages, and general mailings, (iii) showed the premises to various prospective tenants, and (iv) listed the premises at the fair rental rate. *Wingate v. Gin*, 714 P.2d 459, 461 (Ariz. Ct. App. 1985). The Arizona Court of Appeals found that the tenant did not meet its burden of proving that the landlord failed to reasonably mitigate its damages because the tenant failed to present any testimony or affidavit of a realtor or other knowledgeable person in the field to dispute the reasonableness of the landlord's reletting efforts or the listed rental amount. *Id*. Because landlords have a duty to use reasonable efforts, not heroic, to rent the abandoned premises at a fair rental, the Arizona Court of Appeals was satisfied that the affidavit of the landlord's leasing agent established that reletting efforts, although unsuccessful as the premises remained vacant at the time of the proceeding, had been reasonably made. *Id*. at 462.

Likewise, in *Carpenter v. Wisniewski*, the Indiana Court of Appeals held that a commercial landlord satisfied its duty to mitigate its damages by advertising the vacant premises in the newspaper and hiring a realtor after the tenant vacated the premises. *Carpenter v. Wisniewski*, 215 N.E.2d 882, 884 (Ind. Ct. App. 1966). The Indiana Court of Appeals did not find that the commercial landlord's rejection of substandard offers from prospective tenants, the failure of negotiations with prospective tenants to come to fruition, or the fact that the premises remained vacant at the time of the trial were evidence that the landlord's efforts were unreasonable. *Id*. There was also no mention by the Indiana Court of Appeals that the commercial landlord acted unreasonably in failing to accept the highest offer from prospective tenants for One Hundred Twenty-Five and 00/100 Dollars ($125.00) per month when the rent under the original lease was Two Hundred Eighty-Five and 00/100 Dollars ($285.00) per month. *Id*. These cases demonstrate that rejecting subpar offers and maintaining a market-value listing price is consistent with reasonable mitigation efforts, as long as the landlord actively markets the property.

Appellant demonstrated its reasonable efforts to re-let the Premises at market value—such as marketing the Premises, engaging brokers, and rejecting commercially unreasonable offers—and as such Appellant satisfied its duty to mitigate. (R. 0038, lines 5-9); (R. 0041, lines 9-11); (R. 0045, lines 9-10); (R. 0031). Accepting offers at half the fair market value or lowering the listing price to below-market rates is not required and would be inconsistent with the principles of commercial reasonableness. Accordingly, Appellant's actions in rejecting the substandard offer of $6.00 per square foot and maintaining a market-rate listing price is entirely lawful and consistent with Appellant's duty to mitigate damages. Because Appellant refused the insufficient offer it was able to secure a lease with the new tenant on September 8, 2023, at the rate of $13.15 per square foot, which ultimately reduced Appellant's total damages to Four Hundred Twenty-Seven

Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0031-0032). Thus, Appellant fully satisfied its duty to mitigate damages.

Therefore, Appellant respectfully requests that this Court reverse the trial court's erroneous decision and award Appellant damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

C. Appellant's duty to mitigate did not arise prior to Appellant declaring Respondent in default of the Lease.

The trial court's holding that Appellant's duty to mitigate arose at the outset of the Lease due to the nonpayment of the security deposit is without merit, as Appellant had neither declared Respondents in default nor taken any actions to terminate the Lease at that time. (R. 0033); (R. 0046, lines 24-25); (R. 0047, lines 1-3). In South Carolina, a landlord has a duty to mitigate damages in a commercial lease upon declaring the tenant in default and terminating the lease by re-entering the premises. *U.S. Rubber Co.,* 231 S.C. at 95, 97 S.E.2d at 409. The duty to mitigate damages requires the injured party to take reasonable steps to minimize the losses caused by the other party's breach. *See Hunter*, 90 S.C. at 512, 73 S.E. at 1019. However, courts have consistently recognized that a contracting party has the right to waive strict compliance with a condition precedent. *Edwards v. Rouse*, 290 S.C. 449, 451, 351 S.E.2d 174, 176 (Ct. App. 1986). Additionally, a party's waiver of its right to object to a minor violation of its rights does not constitute a waiver of its right to object to a subsequent and more serious violation. *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). Further, when a lease sets forth the acts which would constitute a default, and the mode of terminating the tenancy, the parties' rights are to be determined by a fair construction of the contract. *Litchfield Co. of S.C., Inc. v. Kiriakides*, 290 S.C. 220, 225, 348 S.E.2d 344, 347 (Ct. App. 1986).

In *E & S Inv. Corp. v. Richland Bowl, Inc*., the South Carolina Supreme Court found that a landlord's failure to insist upon strict compliance with the rent payment terms of the lease by allowing for rent to be paid biweekly or weekly rather than monthly did not permit the tenants to commit other delinquencies in rent payment, because the lease contained a valid non-waiver provision. *E & S Inv. Corp. v. Richland Bowl, Inc.,* 264 S.C. 582, 587, 216 S.E.2d 522, 524 (1975).

In *Litchfield Co. of S.C., Inc. v. Kiriakides,* the Court of Appeals found that in accordance with the terms of the lease, the tenant's nonpayment of rent for the months of June and July did not in itself terminate the lease but instead it merely gave the landlord the option to terminate the lease by giving notice and then repossessing the premises. *Litchfield Co. of S.C., Inc.,* 290 S.C. at 225, 348 S.E.2d at 347. There the lease had required rent to be paid on or before the first of each month. *Id*. at 223, 348 S.E.2d at 346. The lease also provided the tenant with the right to cure its default within ten days after written notice of failure to pay, but after the ten-day cure period and while the default continues, the landlord has the right to elect to terminate the lease and repossess the premises provided they give the tenant notice of the landlord's intent to terminate the lease. *Id*. at 223, 348 S.E.2d at 346.

In the present case, the trial court asserts that "a security deposit […] was due upon signing of the Lease. Defendants never made payment of the security deposit. […] Therefore, the Court finds that the Lease was in breach no later than year-end of 2021." (R. 0004). The trial court further errs in stating that "despite the default in payment of the security deposit upon commencement of the Lease, Plaintiff failed to list the property for rent with a real estate broker until July 2022, more than six months after the default by the Defendants." (R. 0004).

Although Respondents failed to pay the initial security deposit, Appellant exercised its discretion and refrained from treating this omission as a material breach, which was consistent

with the Lease's non-waiver clause and precluded any duty to mitigate at that time. (R. 0033; R. 0046, lines 24-25; R. 0047, lines 1-3). Section 26(a) of the Lease states in relevant part "no waiver of any condition or legal right or remedy shall be implied by the failure of Landlord to declare forfeiture of for any other reason […]." (R. 0063-0090). Additionally, Section 19 of the Lease states:

> "Whenever a Default has occurred and is continuing, Landlord will have the right, notwithstanding the fact that Landlord may have some other remedy hereunder or at law or in equity, to terminate this Lease on a date specified in a written termination notice delivered to Tenant, which date must be at least five (5) days after the date Tenant receives such notice." [*Emphasis added.*] Compl. Ex. A.

Appellant's decision to permit the Respondents to proceed with occupying the space and opening their business was a practical and permissible business choice under the Lease terms, especially given the six (6) month rent-free period provided to assist Respondents in establishing their business and the fact that Respondents paid the security deposits for the other leases that they entered into with Appellant around the same time that they executed the Lease in dispute. (R. 0043, lines 4-6); (R. 0046, lines 24-25); (R. 0047, lines 1-3); (R. 0034). By not declaring a default at the outset, Appellant exercised its discretion provided by the Lease, including the non-waiver clause. Courts in South Carolina enforce such clauses, recognizing that they allow parties to defer enforcement of certain breaches without waiving their rights. Thus, until Appellant declared a default and acted on the breach, Appellant had no obligation to mitigate damages.

In comparison, Respondents' failure to pay the Minimum Rent after the expiration of the six-month free rent period constituted a material breach of the Lease. Section 19 of the Lease further provides that "the failure to pay any Minimum Rent or Additional Charges as stated in the Lease by the due date and such failure continues for a period of ten (10) days after the due date for such payment" shall be deemed a default under the Lease. [*Emphasis added*.] (R. 0063-0090).

Appellant's duty to mitigate damages arose only after Respondents failed to pay the Minimum Rent, Appellant declared Respondents in default, Appellant provided Respondents with notice in writing and then Respondents failed to cure the default within the required timeframe, forcing Appellant to bring this lawsuit. (R.0020-0021 pp. 21-27); (R. 0034). Respondents' failure to pay the security deposit, while a technical violation, was not treated as a default, and thus no duty to mitigate arose at that time. (R. 0046, lines 24-25); (R. 0047, lines 1-3); (R. 0033). The trial court's determination otherwise is legally unfounded and contrary to established precedent.

For these reasons, Appellant's mitigation obligations did not commence until the Minimum Rent default was declared, and the trial court abused its discretion by holding otherwise and entirely disregarding established legal principles to the detriment of Appellant. Therefore, Appellant respectfully requests that this Court reverse the trial court's erroneous decision and award Appellant damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

II. The Court should reverse the trial court's reduced award of Appellant's damages and instead award Appellant damages equal to all payments due and to-become-due as provided for in the Lease.

The trial court abused its discretion by awarding Appellant reduced damages in the amount of Fifteen Thousand and 00/100 Dollars ($15,000.00), which is equal to less than one month's Minimum Rent under the Lease, rather than all Minimum Rent, Additional Charges and other payments due and to-become-due under the Lease. (R. 0008). It has been established that although Landlords must make reasonable efforts to re-let the premises, they can still recover any shortfall in rent or other amounts owed under the lease. This is because while South Carolina law imposes a duty to mitigate damages following tenant abandonment, the duty does not negate the enforceability of a survival clause. *See U.S. Rubber Co*., 231 S.C. at 95, 97 S.E.2d at 409 (South

Carolina Supreme Court affirmed the landlord's right to recover damages equal to the amount of rent the landlord would have received for the remainder of the tenant's term, less the rent received from subsequent tenants in mitigation because termination of the lease did not affect the tenant's contractual liability to the landlord under the lease). Survival clauses are particularly vital in commercial leases, as they protect landlords from financial losses due to tenant breaches. South Carolina courts routinely uphold commercial lease provisions that are unambiguous and not contrary to public policy. *S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 657, 667 S.E.2d 7, 14 (Ct. App. 2008).

For example, the South Carolina Supreme Court in *Simon v. Kirkpatrick* recognized the longstanding rule that the termination of a lease does not release the lessee from any obligations incurred up to the date of termination, but it does release the lessee from future obligations, **UNLESS** the lease shall provide that, notwithstanding the termination for cause by the lessor, the lessee shall not be relieved of such future obligations. [*Emphasis added*.] *Simon v. Kirkpatrick*, 141 S.C. 251, 262, 139 S.E.2d 614, 618 (1927).

In *Blumberg v. Nealco, Inc*., the Court of Appeals confirmed that the termination of a lease ordinarily terminated a lessor's right to future payments. *Blumberg v. Nealco, Inc*., 307 S.C. 537, 539, 416 S.E.2d 211, 212 (Ct. App. 1992). However, the Court of Appeals clarified that if a lease agreement provided for the payment of future rents, termination would not release the lessee from such future obligations. *Id*. at 539, 416 S.E.2d at 212. Likewise, in *Sapp v. Wheeler*, the Court of Appeals addressed a landlord's right to recover future damages under a lease agreement. *Sapp v. Wheeler*, 402 S.C. 502, 508, 741 S.E.2d 565, 569 (Ct. App. 2013). The Court of Appeals found that, pursuant to the language in the lease, the landlord could terminate the lease for any breach and recover damages, including future rent, if the reserved rent under the lease exceeded the

reasonable rental value of the premises. *Id*. at 508, 741 S.E.2d at 569. Later, in *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, the Court of Appeals held that the landlord was entitled to recover future rents under the damages term in the lease, even after the tenant's abandonment and the landlord's reentry and reletting of the premises. *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 568, 772 S.E.2d 882, 890 (Ct. App. 2015).

Here, the Lease contains a valid and enforceable survival clause, obligating Respondents to continue payment obligations even after abandonment and Lease termination. Specifically, Section 16 of the Lease states:

> "Tenant shall not vacate nor abandon the Leased Premises at anytime during the term of this Lease, nor permit the Leased Premises to remain unoccupied for a period longer than ten (10) consecutive days during the term of this Lease. If Tenant shall abandon, vacate or surrender the Leased Premises, or be dispossessed by process of law, or otherwise, any personal property belonging to Tenant and left on the Leased Premises shall, at the option of Landlord, be deemed abandoned and available for Landlord to use or sell to offset amounts due and payable. Should the Leased Premises be presumed to be vacated or abandoned, Landlord has the right, without being held as trespassing, to enter and recapture the Leased Premises. From and after the date of such recapture, the Lease shall be deemed terminated; provided, however, that such termination shall not relieve Tenant of Tenant's obligation to pay all amounts otherwise due or to-become-due under the Lease." [*Emphasis added*.] Compl. Ex. A.

As further evidence that Respondents were not relieved of their financial obligations under the Lease, Section 19 of the Lease states in pertinent part:

> "Landlord shall be entitled all remedies available by law including recovering monies due to Landlord and applicable late fees and/or eviction of Tenant from the Premises. If Landlord terminates this Lease pursuant to this Section 19, Tenant will remain liable for (i) the sum of (x) all Minimum Rent, Additional Charges and other amounts payable by Tenant hereunder until the date this Lease would have expired had such termination not occurred, and (y) all reasonable expenses incurred by Landlord in re-entering the Leased Premises, repossessing the same, making good any default of Tenant, painting, altering or dividing the Leased Premises, putting the same in proper repair, reletting the same (including any and all reasonable attorneys' fees and disbursements and reasonable brokerage fees

> incurred in so doing), removing and storing any property left in the Leased Premises following such termination, and any and all reasonable expenses which Landlord may incur during the occupancy of any new tenant (other than expenses of a type that are Landlord's responsibility under the terms of this Lease); less (ii) the net proceeds of any reletting actually received by Landlord. Tenant agrees to pay to Landlord the difference between items (i) and (ii) above with respect to each month during the period that would have constituted the balance of the Term, at the end of such month. Any suit brought by Landlord to enforce collection of such difference for any one month will not prejudice Landlord's right to enforce the collection of any difference for any subsequent month. Tenant's liability under this Section 19 will survive the institution of summary proceedings and the issuance of any warrant thereunder." [*Emphasis added.]* R. 0063-0090.

These Lease provisions ensure Appellant's ability to recover damages while allowing for adjustments based on mitigation efforts. The Lease provisions above also reflect the Parties' intent and provide a mechanism for full recovery, consistent with public policy. Counsel for Appellant attempted to bring this to the trial judge's attention during the default damages hearing, stating "the Lease does provide that the tenant can be responsible for future amounts due, and so we are asking for payment for the entirety of the 10-year lease, which would total $2 million --." (R. 0038, lines 1-4). However, the trial judge quickly interrupted her and said "No." (R. 0038, line 5). The trial court failed to consider these Lease provisions when making its determination of Appellant's damages award as the Order contains no reference to either.

By departing from the longstanding legal principles established by *Simon, U.S. Rubber Co., Blumberg, Sapp* and *Bluffton Towne Ctr., LLC,* the trial court flagrantly abused its discretion by failing to hold Respondents accountable for the full amounts owed under the Lease. This failure not only contravenes the Lease's express terms but also erodes the commercial certainty and fairness that these provisions are designed to uphold. Therefore, Appellant respectfully requests that this Court reverse the trial court's erroneous decision and award Appellant damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

III. The Court should reverse the trial court's reduced award of Appellant's damages as the trial court's conduct during the default damages hearing amounted to an abuse of discretion.

In South Carolina, a defendant in default is precluded from introducing any evidence during a default damages hearing. *See Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (holding that a default admits all well-pleaded facts in the complaint and concedes liability). While a damages hearing is appropriate for determining the amount of damages, the defaulting defendant's participation is limited since the default itself serves as an admission of liability and the facts pled in the complaint. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (noting that a default judgment establishes liability and precludes a defendant from contesting it). There are narrow exceptions to this rule, allowing for evidence related solely to damages but not to dispute liability.

A. The trial court abused its discretion by allowing Ms. Tiet to dispute liability during the damages hearing.

The trial court erroneously allowed Ms. Tiet to dispute liability during the default damages hearing which constitutes an abuse of its discretion. South Carolina law recognizes that a default constitutes an admission of all well-pleaded facts in the complaint regarding liability. *Roche,* 332 S.C. at 81, 504 S.E.2d at 314. A default judgment establishes liability for the claims set forth in the complaint. *Howard,* 271 S.C. at 242, 246 S.E.2d at 882. As such, a defendant in default loses the right to contest liability and is generally barred from introducing evidence that contradicts the facts admitted by default. *See Morgan's, Inc. v. Surinam Lumber Corp*., 251 S.C. 61, 66, 160 S.E.2d 191, 193 (1968) (held that because the defendant was in default he forfeited his right to answer or otherwise plea to the complaint).

While the default conclusively establishes liability and the facts in the complaint, the defendant can still participate in the damages hearing, but only in a limited manner. *See Ammons*

v. Hood, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986) (holding that in a default action, the finding of default settles the issue of liability so the hearing is solely to determine what damages should be awarded). Since a defendant in default cannot use the damages hearing to contest the cause of damages or argue liability, their participation in a damages hearing is limited to cross-examining witnesses and objecting to evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 578-579 (2013).

In *Limehouse v. Hulsey*, the South Carolina Supreme Court upheld the procedures established in *Howard* and reasoned that "if our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default." *Limehouse*, 404 S.C. at 116, 744 S.E.2d at 578-579. Additionally, in *Jackson v. Midlands Human Res. Ctr*., the Court of Appeals recognized that in a default case, it is the plaintiff that must prove the amount of his damages by competent evidence. *Jackson v. Midlands Human Re. Ctr*., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988).

The trial court abused its discretion by allowing Ms. Tiet to introduce evidence and arguments disputing the liability and facts admitted by default and then relying on such evidence in its Order. Despite the well-pleaded facts in the Complaint stating that Respondents defaulted under the Lease when they failed to pay the Minimum Rent and Additional Charges for June 2022 through August 2022, the trial court allowed counsel for Ms. Tiet to introduce arguments in direct contradiction of the admitted liability. (R. 0063-0090); *See* (R. 0045, lines 1-2, 4-5); (R. 0047, lines 5-8).

By permitting Ms. Tiet to present evidence and arguments that exceeded the narrow purpose of a damages hearing—quantifying damages—the trial court violated established legal principles governing the scope of default proceedings. This departure from precedent disrupted the

balance of fairness, undermined the binding nature of default, and prejudiced Appellant's right to enforce liability as admitted in the pleadings. Accordingly, the trial court's actions constitute an abuse of discretion that warrants reversal. Therefore, Appellant respectfully requests that this Court reverse the trial court's erroneous decision and award damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

B. The trial court abused its discretion by contradicting the well-pleaded facts of the Complaint in its order.

The trial court abused its discretion by issuing an order that contradicted the well-pleaded facts of the Complaint, which were admitted by Respondents' default. South Carolina law unequivocally provides that a default constitutes an admission of all well-pleaded factual allegations in the complaint. *Roche,* 332 S.C. at 81, 504 S.E.2d at 314. Once a default is entered, the allegations regarding liability are conclusively established, and the defaulting party is precluded from contesting them. *Howard,* 271 S.C. at 242, 246 S.E.2d at 882. Likewise, the default authorizes the entry of any judgment warranted by the facts alleged in the complaint. *State ex rel. Medlock v. Love Shop, Ltd*., 286 S.C. 486, 489, 334 S.E.2d 528, 530 (Ct. App. 1985). "It is well established that the relief granted in a default judgment is limited to that supported by the allegations in the complaint and the proof submitted during the damages hearing." *Limehouse*, 404 S.C. at 116, 744 S.E.2d at 579.

In *Jackson v. Midlands Human Re. Ctr*., the Court of Appeals clarified that although the defendant is in default as to liability, the award of damages must be in keeping with the allegations of the complaint, prayer for relief, and the proof that has been submitted by the plaintiff. *Jackson*, 296 S.C. at 520, 374 S.E.2d at 506.

Appellant filed a Complaint alleging that Respondents breached the Lease by failing to pay the Minimum Rent and Additional Charges due under the Lease for the months of June 2022, July 2022 and August 2022. (R. 0021 pp. 30-32). Appellant also sought a declaratory judgment from the trial court that the Lease was terminated as of July 24, 2020, which was five (5) days after Appellant provided Respondents with notice of their default and Appellant's intent to terminate the Lease due to Respondents' breach of the Lease. (R. 0021 pp. 23-27). Respondents failed to answer or otherwise respond, and the trial court entered default against them. (R. 0023-0025); (R. 001-002). The trial court's subsequent order, however, stated that "per the allegations in the Complaint, the Lease has been terminated as of July 24, 2022. However, the Defendants were in default as of January 1, 2022, some six months earlier" contradicting the allegations in the Complaint. (R.0005). By disregarding the Complaint's well-pleaded facts and finding that the breach occurred on a different date, the trial court violated the procedural and substantive principles governing orders for entry of defaults, prejudicing Appellant and undermining the integrity of the judicial process.

The trial court, having entered default against Respondents, was bound by established legal principles, as articulated in *Roche*, *Jackson* and *Howard*, to accept Respondents' default as an admission of liability as to the well-pleaded facts in the Complaint and to likewise award damages consistent with those facts. The trial court's failure to adhere to established legal principles resulted in an erroneous finding that the breach of the Lease occurred in January 2022 rather than June of 2022 which Respondents had admitted to through their default. (R.0005). This deviation from the admitted facts of the Complaint was impermissible and exceeded the trial court's authority. The trial court's role in a default damages hearing is to determine the amount of damages to be awarded based on the facts admitted in the Complaint and the evidence presented by the Plaintiff.

The trial court's decision to award damages inconsistent with Respondents' liability for breach of the Lease as set forth in the Complaint and as admitted by way of default conflicts with South Carolina law and has prejudiced Appellant. Thus, the trial court abused its discretion by contradicting the well-pleaded facts of the Complaint admitted by default. Therefore, Appellant respectfully requests that this Court reverse the trial court's erroneous decision and award damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31). (R. 0032).

IV. The trial court abused its discretion by reducing Appellant's attorneys' fees without addressing any of the required *Blumberg* factors.

The trial court abused its discretion when it reduced Appellant's attorneys' fees because it failed to address any of the six *Blumberg* factors, as required by South Carolina law, when determining reasonable fees. (R.0008). The timing of the submission of the affidavit of attorneys' fees—whether before, during, or after the damages hearing—does not absolve the trial court from its duty to analyze and make factual findings for the *Blumberg* factors to ensure a fair and reasonable determination of fees.

The South Carolina Supreme Court established that the following six factors must be addressed when awarding reasonable attorneys' fees: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. *Blumberg*, 310 S.C. at 494, 427 S.E.2d at 660. Failure to analyze these factors prevents meaningful appellate review and undermines the reasonableness of the fee award.

In *Crestwood Golf Club v. Potter*, the South Carolina Supreme Court recognized that *Blumberg* set forth the factors that are to be considered in attorneys' fee awards and requires judges

to state findings for each of the factors explicitly. *Crestwood Golf Club v. Potter*, 328 S.C. 201, 220, 493 S.E.2d 826, 836-837 (1997).

Similarly, in *Glasscock v. Glasscock*, the South Carolina Supreme Court addressed a situation where the attorney's affidavit was submitted at the hearing on fees. *Glasscock v. Glasscock*, 304 S.C. 158, 160, 403 S.E.2d 313, 314 (1991). Despite the timing, the Supreme Court underscored that the trial court must still apply the *Blumberg* factors and provide detailed factual findings based on those factors to justify the award. *Id*. at 161, 403 S.E.2d at 315.

The Court of Appeals in *Griffith v. Griffith* vacated an attorneys' fee award because the trial court failed to make specific factual findings for the *Blumberg* factors. *Griffith v. Griffith*, 332 S.C. 630, 647, 506 S.E.2d 526, 535 (Ct. App. 1998). The Court of Appeals held that the absence of detailed findings prevented meaningful appellate review and required remand. *Id*. at 647, 506 S.E.2d at 535.

Here, the trial court failed to analyze the nature and complexity of the case, the time and labor involved, or the professional standing of counsel, among other factors, as mandated by *Blumberg*. (R. 0008). The omission was compounded by the fact that the affidavits of attorneys' fees were submitted after the hearing on damages. (R. 0059-0060), (R. 0061-0062). However, as *Glasscock* demonstrates, the timing of the affidavit does not excuse the trial court's obligation to address the *Blumberg* factors in its order. Further, Counsel for Appellant testified during the damages hearing as to the amount of attorneys' fees incurred stating that "the plaintiff has incurred $8,357.19 in attorneys' fees and costs since filing this in 2022." (R.0038, lines 13-15.) Instead of taking the time to ask Appellant's attorney, Attorney Huffer, any questions related to the *Blumberg* factors during the damages hearing, the trial court chose to question Attorney Huffer about the attorneys' fees that Appellant incurred while Attorney Huffer was still with her previous law firm,

and Appellant's decision to follow Attorney Huffer to her new law firm. *See* (R. 0038, lines 21-15); (R. 0039, lines 1-12).

The two attorneys' fees affidavits submitted provided support for the time and labor expended and the professional standing of Appellant's Counsel. *See* (R. 0059-0060), (R. 0061-0062). However, the trial court failed to engage with this evidence or weigh it against any of the *Blumberg* factors. (R. 0008).

By failing to address any of the *Blumberg* factors, the trial court disregarded established South Carolina legal principles governing reasonable attorneys' fees. This failure deprived Appellant of a reasoned determination of fees, undermined the fairness of the award, and prevented meaningful appellate review. Therefore, Appellant respectfully requests that this Court reverse the trial court's reduction of attorneys' fees and remand the matter for a proper consideration of the required *Blumberg* factors.

CONCLUSION

For these reasons, the Court should reverse the decision of the trial court and award Appellant damages in the amount of Four Hundred Twenty-Seven Thousand Three Hundred Thirty-Three and 31/100 Dollars ($427,333.31) and remand the matter of reasonable attorneys' fees for a proper consideration of the *Blumberg* factors.

[*Signature Page to Follow*]

Very Respectfully Submitted,

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