THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

Sea Island Food Group, LLC, d/b/a Squeeze..... Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership ..... Defendants,

Michael J. Quillen Family Limited Partnership..... Third-Party Plaintiff,

v.

Top of the Bay, LLC..... Third-Party Defendant

Top of the Bay, LLC d/b/a Club Light ..... Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises .....Fourth-Party Defendant, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in failing to grant directed verdict and judgment notwithstanding the verdict in favor of Yaschik on Top of the Bay's claim of intentional interference with contractual relationship after the trial court ruled as a matter of law that there was no contractual duty that was breached?

II. Whether the trial court erred in failing to grant a judgment notwithstanding the verdict in favor of Yaschik on Top of the Bay's claim for intentional interference with contractual relationship considering Yaschik was justified in its actions by exercising its contractual rights under the master lease and by pursuing its business interests?

III. Whether the jury's punitive damages award was improper and contrary to law?

STATEMENT OF THE CASE

I. Procedural History

This case concerns a dispute involving the termination of a master lease and subleases for the building located at 213 East Bay Street in Charleston, South Carolina, after the building burned on April 2, 2013. After the building burned, Appellant/Respondent Yaschik Development Company, Inc., d/b/a Yaschik Enterprises ("Yaschik") terminated the master lease, which also caused the subleases to terminate.

On December 5, 2013, Sea Island Food Group, LLC d/b/a Squeeze ("Squeeze"), one of the subtenants, filed its complaint against Yaschik and the master tenant, Michael J. Quillen Family Limited Partnership ("FLP"), in the Court of Commons Pleas for Charleston County, South Carolina. (R. pp. 124-151.) Squeeze subsequently filed on May 13, 2015, an amended complaint, adding additional claims against Hilton Smith and East Bay Company LTD. (R. pp. 152-164.)) Squeeze asserted causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and intentional interference with a contractual relationship against Yaschik arising from the termination of the master lease and consequent termination of its sublease. (*Id.*)

FLP later filed cross-claims against Fourth-Party Plaintiff Top of the Bay, Inc. d/b/a Club Light ("Top of the Bay"), which was another subtenant in the building. (R. pp. 165-186.) Top of the Bay, in turn, filed cross-claims against Yaschik for breach of contract, breach of contract accompanied by a fraudulent act, and intentional interference with a contractual relationship, which are in all material respects identical to the claims that Squeeze asserted against Yaschik. (R. pp. 187-198.)

Top of the Bay asserted two claims arising from FLP's alleged breach of the sublease. (*Id.*) First, Top of the Bay claimed that FLP breached the sublease by failing to restore the fire-damaged premises and terminating it instead. (*Id.* at ¶¶ 39-52.) Second, Top of the Bay alleged that Yaschik

intentionally interfered with the sublease by procuring FLP's breach of the sublease by terminating the master lease. (*Id.* at ¶¶ 66-71.)

After the close of the evidence, the trial court directed verdict on Top of the Bay's breach of contract claim against FLP. (R. pp. 72, line 16-p. 73, line 10.) According to the trial court, Top of the Bay could not prevail on its breach of contract claim because FLP had no duty to restore the premises and because it was impossible for FLP to restore the premises:

> "[A]nd Squeeze and FLP, again, they don't have any basis for suing FLP for breach of contract because FLP didn't have the duty to make repairs and restore the property, and it was impossible for them to perform, in any event, if they did have such a duty because of the declaration of it being totally destroyed.

(R. p. 89, lines 7-13.)

Despite finding no contractual duty under the sublease for FLP to breach, the trial court denied Yaschik's motion for directed verdict on Top of the Bay's interference claim. (R. p. 70, lines 14-23.)

The jury then returned a verdict in favor of Top of the Bay on its interference claim against Yaschik.[1] (R. pp. 122-123.) The jury awarded Top of the Bay $1.00 in nominal damages and $133,333.33 in punitive damages. (*Id.*)

On February 12, 2018, Yaschik timely moved for judgment notwithstanding the ("JNOV"), or, in the alternative, a new trial, or, in the alternative, a new trial nisi remittitur and a motion for setoff. (R. pp. 205-241.) (Yaschik Post Trial Mot.) Yaschik argued that the trial court should grant JNOV in favor of Yaschik on the claim for intentional interference since: (1) there was no breach of the subleases; (2) Yaschik was justified in exercising its contractual rights to terminate

[1] The jury also returned verdicts against Yaschik on Squeeze's claim for intentional interference with contractual relations and on FLP's breach of contract claim. (R. p. 122.) The jury returned a verdict in favor of Yaschik on FLP's breach of contract accompanied by a fraudulent act. (R. p. 122.) Yaschik subsequently settled all claims with Squeeze and FLP.

the Master Lease; and (3) Top of the Bay's evidence of damages was unreliable and speculative. (R. pp. 208-218.) Yaschik further argued, among other things, that a new trial absolute was required to rectify the jury's award of punitive damages which were improper and contrary to law. (R. pp. 219-237.) (*Id.* at pp. 15-33). Lastly, Yaschik argued the trial court should reduce the excessive nature of the jury's award of damages. (R. pp. 237-240.) (*Id.* at pp. 33-36.)

On May 7, 2018, the trial court issued its order on post-trial motions, denying Yaschik's Motion for JNOV, or, in the alternative, a new trial, or, in the alternative, a new trial nisi remittitur and granting, in part, and denying, in part, Yaschik's motion for setoff. (R. pp. 1-19.) The trial court ruled that FLP's inability to perform inherently entailed the breach of the subleases, and the question of Yaschik's justification was a question of fact for the jury to decide. (R. pp. 7-8.) The trial court also held that the award of punitive damages to Top of the Bay was not constitutionally excessive and justified the refusal to reduce the punitive damages by comparing the punitive damages awarded to Squeeze, even though Top of the Bay was not awarded actual damages. (R. pp. 13-14.)

On May 11, 2018, following the receipt of the order on post-trial motions, Yaschik timely filed and served its notice of appeal. (R. pp. 242-278.) On June 1, 2018, Yaschik filed an amended notice of appeal. (R. pp. 279-311.)

II. Statement of the Facts

Yaschik purchased 213 East Bay Street in 2003 from the former owner, 213 East Bay Associates, Inc. (R. p. 323, lines 22-23.) As a result of that purchase, Yaschik received an assignment of the existing master lease between the former owner and then existing tenant. (R. p. 324, lines 2-6.) The master lease was a triple-net lease, which required the tenant to pay for all taxes, insurance, and maintenance. (R. p. 346, lines 15-22; p. 569, ¶ 37.) Specifically, the master

lease required the tenant to maintain one million dollars in liability insurance coverage and separate "fire and extended insurance coverage." (R. p. 567, ¶ 10; p. 569, ¶ 37.) The master lease also provided that if the "premises are totally destroyed by fire or other casualty, the lease shall terminate as of the date of such destruction and rental shall be accounted for as between Landlord and Tenant as of that date." (R. p. 341, lines 4-21; p. 568, ¶ 20.)

Prior to 2012, the tenant under the master lease subleased portions of the 213 East Bay Street to three subtenants, including Squeeze and Top of the Bay. (R pp. 570-573, pp. 626-634.) Those subleases contained substantially similar terms as the master lease, including the provision relating to damage or destruction by fire. (R. p. 315, lines 2-17; p. 570, ¶ 20; p. 631, ¶ 18.) Under those provisions, the master tenant was responsible for "restor[ing] the premises to substantially the same condition as prior to damage as speedily as practicable . . ." (R. p. 631, ¶ 18; p. 378, line 1-p. 379, line 25.)

In 2012, the tenant sold and assigned the master lease and two subleases for 213 East Bay Street to FLP. (R. pp. 575-593; p. 381, lines 1-8.) As a result, FLP assumed and was assigned all of the former tenant's rights and obligations under the master lease and the two subleases. (R. p. 575, ¶ 2; p. 337, lines 5-18.) In addition, the property and casualty insurance in the amount of one million dollars was transferred from the former tenant to FLP. (R. pp. 542-544; p. 402, line 14-p. 403, line 9.)

In April 2013, a fire occurred at 213 East Bay Street, causing substantial damage and destruction. (R. p. 347, lines 2-8.) Following the fire, and pursuant to the terms of the master lease, Michael J. Quillen, FLP's general partner, spearheaded the process to secure the building and getting it rebuilt. (R. p. 348, lines 1-17.) Mr. Quillen subsequently engaged an engineering firm

named Applied Building Sciences ("ABS") to come up with the plans to put the building back in operation. (R. p. 420, lines 1-17.)

Shortly after the fire, Mr. Quillen emailed the limited partners of FLP and several employees of ABS stating, "I feel that it is the FLP's responsibility to put the space back to an acceptable condition, at minimum." (R. p. 532; p. 396, line 14-p. 397, line 5.) In May of 2013, Mr. Quillen filed an insurance claim with FLP's insurance company to use the insurance proceeds to hire and pay the engineers and contractors necessary for the reconstruction. (R. p. 405, lines 8-14.) Mr. Quillen directed and managed those efforts until the beginning of September of 2013. (R. p. 405, lines 2-22.)

As ABS and FLP undertook the process of redesigning and restoring the property, Hilton Smith of East Bay Company, which owned other properties in the area, approached Yaschik was in May of 2013 about selling 213 East Bay Street. (R. p. 360, line 17-p. 361, line 10.) Mr. Ervin proposed a price for Yaschik to sell the building to East Bay Company, and Yaschik and East Bay Company continued to have occasional discussions about a potential sale over the next several months. (R. p. 361, lines 17-24.) In addition, Yaschik also had discussions with Mr. Quillen about selling the building to FLP. (R. p. 363, line 25-p. 364, line 9.) However, no deal was reached between Yaschik and any prospective purchaser during the spring, summer, or fall of 2013. (R. p. 371, line 13-p. 372, line 3.)

Soon after starting its work, ABS became aware of seismic issues related to rebuilding the building in compliance with applicable sections of the earthquake building code. (R. p. 421, lines 7-16.) The property was built in the 1800s, and prior to the fire, was not up to the current building code. (R. p. 419, lines 5-16.) Any repairs or restoration of the property would have to comply with the 2012 earthquake code. (R. p. 398, lines 11-25.) Edward Porcher, the engineer in charge of

rebuilding, realized that bringing the property up to seismic code requirements was an "absurd task." (R. p. 424, lines 10-20.) "[T]o try to bring this old, unreinforced masonry building up to current code to meet seismic, I didn't feel it was cost effective or feasible." (*Id.*)

In June of 2013, Mr. Quillen sent Mr. Ervin an e-mail updating him on the redesign and reconstruction progress. (R. p. 525; p. 351, lines 11-18.) Mr. Quillen stated that the engineers had encountered "real challenges" with the structural design for the reconstructed building because of the need to comply with updated building code requirements for earthquakes. (R. p. 525; p. 351, lines 11-25.) Mr. Quillen further said that more analysis would be needed before there could be an accurate estimate of the total reconstruction costs but that it "will certainly exceed the insurance policy possibly by a significant amount." (R. p. 525; p. 399, lines 1-9.) Mr. Quillen also estimated that the final design for the reconstruction of the building was "still a few weeks away." (R. p. 525; p. 352, lines 9-17.) Mr. Quillen, however, never provided Mr. Ervin with a final design. (R. p. 352, lines 9-17.)

In early August of 2013, Mr. Quillen sent another e-mail to Mr. Ervin stating that "to start back with reconstruction will require a commitment on someone's part for the job which will exceed the insurance proceeds." (R. p. 531; p. 407, line 23-p. 408, line 3.) The e-mail also stated that the engineers expected to have structural plans ready by Wednesday of the following week. (R. p. 531; p. 407, lines 4-7.) However, Mr. Ervin did not receive the structural plans until August 30, 2013, and those plans were preliminary and not finalized. (R. p. 422, lines 3-14.)

A few days later, Mr. Quillen sent an e-mail to Mr. Ervin providing Mr. Quillen's guess as to the full reconstruction cost of the building. (R. p. 526; p. 353, line 10-p. 355, line 10.) Mr. Quillen stated that in addition to the almost $500,000.00 already incurred on engineers and

contractors to shore the building, it could cost an additional 1.5 to 1.8 million dollars to rebuild. (R. pp. 545-564; p. 525; pp. 613-622; p. 353, line 10-p. 355, line 10.)

In fact, Mr. Quillen signed and submitted an insurance claim form stating that the total repair or replacement cost was $1,861,815.34. (R. pp. 527-530; p. 409, line 18-p. 4011, line 3.) However, the insurance policy was capped out at only $1,000,000. (R. p. 329, lines 17-20; pp. 527-530.) The insurance company ultimately paid out the entire $1,000,000 policy limit as a result of the extensive damage to the property. (R. p. 344, lines 4-8.)

Finally, on September 3, 2013, Mr. Quillen, for the first time, sent Mr. Ervin a letter that stated, "Yaschik as the building owner is required to take over the direction and management of this rebuilding in its capacity as the building owner and as the landlord responsible per the master lease." (R. pp. 623-624; p. 325, lines 5-16.) In that letter, Mr. Quillen also represented that the structural plans would be completed on that day and available to submit to the City of Charleston for permitting and to the contractor for a cost estimate. (R. pp. 623-624; p. 400, line 23-p. 401, line 25.) However, no final structural plans were provided by Mr. Quillen or the engineers. (R. p. 355, lines 17-25.)

Following the receipt of Mr. Quillen's letter in which he abandoned his responsibility for overseeing the redesign and restoration of the property, Mr. Ervin was forced to evaluate the various options relating to the restoration of property and Yaschik's obligations under the master lease. (R. p. 356, line 7-p. 358, line 9.) Due to the requirement to bring the property up to current building codes, it was more economical to demolish the property and completely rebuild it. (*Id.*) Thus, Mr. Ervin considered the property totally destroyed and terminated the Master Lease since complete use of the property was lost. (R. p. 423, lines 6-12.) The termination was based on an inspection of the property and in consideration of information from FLP, city officials, insurance

adjusters, engineers, and other professionals working on the property. (R. p. 356, line 7-p. 358, line 23.)

On September 11, 2013, Mr. Ervin sent Mr. Quillen a letter advising of Yaschik's decision to terminate the master lease. (R. p. 625; p. 356, lines 2-6.) In the letter, Mr. Ervin stated, "[s]ince the fire at the leased property has led to a total loss of the subject premises, the Master Lease has been automatically terminated pursuant to the terms of the first sentence of Paragraph 20 of the master lease." (R. p. 625; p. 341, lines 4-11.). Pursuant to the terms of the subleases, once the master lease terminated, the subleases also terminated. (R. p. 631, ¶ 18; p. 345, lines 16-19)

Faced with a substantially destroyed building and insufficient insurance proceeds to restore it, Yaschik resumed negotiations to sell the building to East Bay Company around October of 2013. (R. p. 333, lines 17-19.) Mr. Ervin also informed Mr. Quillen that he was in talks with Mr. Smith to sell the property. (R. 363, lines 10-24.) Ultimately, Yaschik and East Bay Company entered into a sale agreement in late December of 2013. (R. pp. 594-611; p. 334, lines 13-19.) Through negotiation, Yaschik secured a purchase price that Mr. Ervin believed would leave sufficient profit to pay FLP to resolve its potential claim for its lost investment in the master lease and subleases resulting from their termination. (R. p. 331, line 4-p. 333, line 19.)

Also, Yaschik and East Bay Company included provisions in the sale agreement that required the parties to agree upon terms of new leases with the subtenants, including Top of the Bay, that did not change the business terms of the subleases. (R. pp. 594-611; p. 317, line 22-p. 318, line 12.) Under these provisions, the parties could terminate the sale agreement if the parties failed to reach an agreement on terms with the subtenants. (R. p. 7 ¶ 3(b); p. 317, lines 5-15.) Mr. Ervin insisted on this term to ensure that the subtenants could maintain their businesses in the building if they so desired. (R. pp. 540-541; p. 612.)

Yaschik and East Bay Company, however, never finalized the transaction. (R. p. 370, lines 18-23.) Instead, Yaschik retained ownership of the building and has undertaken efforts to restore the property at an expense of millions more than what was available in insurance proceeds. (R. p. 371, line 12-p. 372, line 20.)

ARGUMENT

I. The trial court erred in not granting directed verdict and JNOV in favor of Yaschik on Top of the Bay's claim of intentional interference with contractual relationship.

A. Standard of Review

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct. App. 2005) (citations omitted). "The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Burns v. Universal Health Servs.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004).

B. Because the trial court ruled that the sublease terminated and FLP had no duty to restore the premises, Yaschik was entitled to directed verdict or JNOV on Top of the Bay's intentional interference with contractual relationship cause of action.

Under South Carolina law, "[t]he elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E.2d 444, 449 (Ct. App. 2008) (citing *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)). "[W]ithout a breach of the underlying contract, there can be no recovery." *First Union*

Mortg. Corp. v. Thomas, 317 S.C. 63, 73, 451 S.E.2d 907, 913 (Ct. App. 1994); *see also Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) ("An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. . . . Where there is no breach of the contract, there can be no recovery.") (citations omitted).

Top of the Bay's claim against Yaschik for intentional interference with contractual relationship is based on the allegation that Yaschik improperly procured FLP's breach of its sublease with Top of the Bay. Specifically, Top of the Bay claimed that FLP breached the sublease by failing to speedily make repairs and return the building to substantially the same condition as prior to the fire and that such breach was procured by Yaschik. (R. p. 194, ¶ 47.) Top of the Bay also maintained causes of action directly against FLP for breach of contract based, in part, on its failure to restore the premises to substantially the same condition as prior to the fire. (R. p. 194, ¶¶ 48 & 51.) Thus, Top of the Bay's claim against Yaschik for intentional interference with contractual relationship derives from the same allegations that form the basis of its claim for breach of contract against FLP.

At the close of evidence, the trial court granted directed verdict on Top of the Bay's claim against FLP for breach of contract and ruled as a matter of law that, as a result of the termination of the master lease, FLP had no duty to restore the premises and that it was impossible for FLP to restore the premises. (R. p. 73, lines 2-4.) Based on this ruling, the trial court should have directed verdict or granted JNOV to Yaschik on Top of the Bay's interference claim because if FLP had no contractual duty to restore the premises, then there could have been no procurement of a breach of that duty. By failing to do so, the trial court erred as a matter of law.

As stated above, "without a breach of the underlying contract, there can be no recovery." *First Union Mortg. Corp.*, 317 S.C. at 73, 451 S.E.2d at 913. Here, because the trial court ruled that FLP had no duty under the sublease to restore the premises, then it would have been legally impossible for Yaschik to procure the breach of the sublease. And without establishing that Yaschik procured the breach of the sublease, Top of the Bay cannot prove an essential element of its intentional interference claim. Therefore, Yaschik was entitled to directed verdict on Top of the Bay's claim. *See id.* (reversing the trial court's denial of directed verdict on interference claim because plaintiff did not prove a breach of the underlying contract); *Eldeco*, 372 S.C. at 482, 642 S.E.2d at 732 (affirming directed verdict against plaintiff's interference claim because plaintiff did not prove that third party breached the underlying contract).

When confronted with this argument on Yaschik's motion for JNOV, the trial court ignored its previous ruling that FLP had no duty to restore the premises and instead couched its ruling as a finding that FLP had proved a valid defense to the breach:

> Specifically, it was found that Yaschik's conduct in sending a letter purporting to terminate the Master Lease made it impossible for FLP to perform its obligations to the subtenants. A finding of impossibility of performance is not a finding that the contract was not breached or that it was cancelled. Rather, the finding was that Yaschik interfered with the subleases and rendered FLP's performance impossible – thereby justifying the breach.

(R. p. 7) This conclusion directly contradicted its previous ruling on directed verdict that "Yaschik's decision to declare [the premises] totally destroyed terminated the leasehold and terminated the sublease hold." (R. p. 72, lines 13-15) (emphasis added).

Not only was the trial court's decision on the JNOV motion inconsistent with its actual ruling on directed verdict, it was also mistaken and contrary to well-established law. In fact, controlling law dictates that a finding of impossibility of performance necessarily precludes a breach of the contract in question. Courts have consistently held that there can be no breach where

performance is impossible because the impossibility of such performance discharges any duty to perform. And with no contractual duty, there can be no breach.

The South Carolina Supreme Court's decision in *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004), proves that the trial court's ruling on JNOV was incorrect and based on a fundamental misunderstanding of the doctrine of impossibility. In that case involving a breach of contract claim, the Supreme Court ruled that when the contract in question became impossible to perform, "both parties' duty to perform under the contract was discharged." *Id.* at 372, 601 S.E.2d at 345. Furthermore, the court declared that "the contract itself was invalidated or rendered 'dead.'" *Id.* As a result, the Supreme Court upheld the trial court's grant of summary judgment on the breach of contract claim and expressly ruled that "[n]either party breached the contract" after "the parties' duty to perform under the contract was discharged according to long-established principles of contract law." *Id.* at 374-75, 601 S.E.2d at 346-47.

As stated in the decision, the Supreme Court's ruling in *White* is consistent with prevailing principles of contract law. For example, the Restatement of Contracts states that "[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *Restatement (Second) of Contracts* § 261. Similarly, *American Jurisprudence* confirms that the "general effect of impossibility or impracticability is to discharge the party asserting the defense from a further duty to perform." 17A *Am. Jur. 2d Contracts* § 652. *American Jurisprudence* further provides that impossibility of performance renders the contract a "nullity." *Id.*

When these controlling principles of contract law are applied to this case in light of the trial court's directed verdict on Top of the Bay's breach of contract claims against FLP, FLP could not have breached its sublease with Top of the Bay. If, as the trial court decided, it was impossible for FLP to restore the premises as required by the sublease because the master lease had been terminated, then FLP's duty to restore was discharged. Because FLP was discharged from said duty, it necessarily could not have breached that duty. Similarly, if it was impossible for FLP to perform under the sublease, then the sublease was invalidated or a nullity. As a result, there can be no breach of a contract that has been rendered invalid or null.

By adopting FLP's impossibility defense, the trial court, *ipso facto*, decided that FLP did not breach the underlying sublease with Top of the Bay. As a result, Top of the Bay cannot prove that Yaschik procured a breach of the sublease as a matter of law, and its claim for intentional interference with contractual relations necessarily fails. Therefore, Yaschik was entitled to directed verdict and JNOV on that claim.

C. The trial court erred in not granting Yaschik directed verdict or JNOV on Top of the Bay's claim for intentional interference with contractual relationship because Yaschik was justified in its actions by exercising its contractual rights under the master lease.

Yaschik was also entitled to directed verdict and JNOV on Top of the Bay's intentional interference with contractual relationship claim because there is no evidence to establish the fourth element of the claim, which is that Yaschik's actions lacked justification. As to this fourth element, "[i]nterference with a contract is justified when it is motivated by legitimate business purposes." *Gailliard v. Fleet Mortgage Corp.*, 880 F.Supp. 1085, 1089 (D.S.C. 1995). Similarly, "there can be no finding of intentional interference with . . . contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." *Eldeco*, 372 S.C. at 482, 642 S.E.2d at 732. Where the defendant is

acting pursuant to an absolute contractual right, equal or superior to the right of the plaintiff, there is no factual issue as to a claim for intentional interference with contractual relations. *S. Contracting, Inc. v. H.C. Brown Constr. Co.*, 317 S.C. 95, 100, 450 S.E.2d 602, 605 (Ct. App. 1994).

According to Top of the Bay, Yaschik lacked a legal or factual basis to terminate the master lease, which led to termination of the sublease and prevented FLP from performing its restoration obligations thereunder. (R. p. 196, ¶ 63.) As explained below, however, Yaschik's exercise of its contractual right, regardless of its motive or means, cannot form the basis of a claim of intentional interference with contractual relations, and Top of the Bay's cause of action fails as a result.

The analysis in *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992), is helpful in illustrating why the trial court should have granted directed verdict or JNOV in favor of Yaschik. In *Webb*, the Webbs sued the Elrods for intentional interference with the Webbs' contractual relations with third parties. *Id.* at 446, 418 S.E.2d at 560. Specifically, the Webbs purchased land from the Elrods via the execution of two notes and mortgages and eventually became delinquent in their payments. *Id.* To assist in making payments, the Webbs sold portions of the land to third party purchasers and told them to make their payments directly to the Elrods. *Id.* The third party purchasers did not make their expected payments, and the Elrods informed them that their payments would no longer be accepted and that the Elrods intended to foreclose on the Webbs' mortgages. *Id.* at 447, 418 S.E.2d at 561.

After the third party purchasers subsequently ceased making all payments, the Webbs sued the Elrods for intentional interference with contract. *Id.* The Webbs asserted that the Elrods interfered with the Webbs's contracts with the third party purchasers by informing the purchasers

that payment would no longer be accepted and of the intention to foreclose. *Id.* At trial, the court granted a directed verdict in favor of the Elrods based on the fact that the Elrods were justified in their actions and "chose to exercise their legal right to foreclose." *Id.* at 448, 418 S.E.2d at 561. In affirming the trial court's decision to grant a directed verdict, the Court of Appeals cited the legal principle that the exercise in good faith of a legal right by a party to a contract affords no basis for an action for intentional interference with a contract. *Id.; see also Gecy v. S.C. Bank & Tr.,* 422 S.C. 509, 521, 812 S.E.2d 750, 756-57 (Ct. App. 2018) (holding bank's adherence to internal financing policy was justified and did not provide grounds for an action for intentional interference with contractual relations).

In this case, the jury's verdict against Yaschik for intentional interference with Top of the Bay's sublease was not supported by the evidence that Yaschik lacked justification in terminating the master lease because Yaschik was pursuing its own contractual rights. Under Section 20 of the master lease, it terminated automatically if the premises were totally destroyed by fire or other casualty. (R. p. 568 ¶ 20.) Thus, termination was an absolute right under the master lease, and Yaschik's exercise of that right was superior to any rights that Top of the Bay possessed under its sublease with FLP because the sublease was subservient to the master lease. 52 C.J.S. *Landlord & Tenant* § 61 ("A sublessee is charged with notice of the terms of the lease and is bound by its conditions.") As such, Yaschik's pursuit of its own contractual rights under the master lease cannot give rise to liability for intentional interference of Top of the Bay's rights under its sublease, which were inferior to Yaschik's rights under the master lease.

The case of *S. Contracting* is also instructive on this point. In that case, SoCon, a subcontractor on a construction project, sued Great American, a bonding company, for intentional interference with contractual relations after Great American directed the termination of SoCon's

subcontract with the prime contractor, Brown Construction. *S. Contracting*, 317 S.C. at 96-97, 450 S.E.2d at 603. Great American had a separate contract with Brown Construction that required Brown Construction to obtain performance and payment bonds from its major subcontractors on the project. *Id.* After SoCon failed to obtain the required bond, Great American allegedly directed Brown Construction to terminate its subcontract with SoCon. *Id.*

In *S. Contracting*, the trial court granted Great American summary judgment on SoCon's claims for intentional interference with contractual relations, finding that Great American's insistence on its contractual rights with Brown Construction was legally justified even if it resulted in the termination of SoCon's subcontract. *Id.* at 98, 450 S.E.2d at 603. The Court of Appeals affirmed summary judgment and held that a claim against a defendant for intentional interference with contractual relations cannot be maintained when the defendant is exercising an absolute right, equal or superior to the plaintiff's right. *Id.* at 100-01, 450 S.E.2d at 605. In doing so, the court rejected SoCon's argument that summary judgment was improper because there was a factual issue based on the purported improper means by which Great American chose to act in enforcing its rights under its contract with Brown Construction. *Id.* at 101, 450 S.E.2d at 605. According to the court, that argument failed because "SoCon was not a party to that contract and had no contractual right to require good faith and fair dealing by Great American. Therefore, any inquiry into the manner or uniformity with which Great American chose to enforce its contract with Brown is irrelevant." *Id.*

S. Contracting dictates that Yaschik should have been granted directed verdict or JNOV on Top of the Bay's claim for intentional interference with contractual relationship. Yaschik's alleged interference with contractual relationship arises from its exercise of its own rights under a separate contract to which Top of the Bay was not a party; just as Great American's alleged

interference arose from its insistence of its rights under a contract to which SoCon was not a party. Also, just as Great American's contract with the prime contractor for the entire construction project was superior to the prime contractor's subcontract with SoCon, the master lease governing the lease is similarly superior to the sublease for a portion of the building held by Top of the Bay. And similar to the arguments made by SoCon, the argument advanced by Top of the Bay in this case attacks the alleged manner of Yaschik's enforcement of its rights under the master lease, which is irrelevant under *S. Contracting*. Therefore, the trial court should have rejected Top of the Bay's intentional interference with contractual relations claim against Yaschik just as the court rejected SoCon's claim in *S. Contracting*.

Furthermore, the evidence and testimony at trial only buttresses the fact that Yaschik was justified in its actions and was pursuing its rights under the master lease. Tom Ervin, president of Yaschik, testified that he terminated the master lease pursuant to paragraph 20 because the building was totally destroyed by fire:

> A. [The termination letter] says the building is a total loss and the lease is terminated. That's what it says.
>
> Q. Under paragraph 20?
>
> A. Yes, sir.

(R. p. 341, lines 18-21.) In addition, when he was asked at trial how he decided the building was totally destroyed, Mr. Ervin stated:

> I met with the engineers that were working on the project. I talked with the construction people that were on the project. I talked to a number of people to come to that conclusion. It was not an easily made decision.

(R. p. 326, lines 17-21; pp. 414-418.) Kelley Tant, the owner of Top of the Bay, also testified at trial that she submitted an affidavit to the Department of Revenue on September 26, 2013, regarding Top of the Bay's liquor license stating, "there was a fire that totally destroyed the

building at 213 East Bay." (R. p. 393, lines 16-17; pp. 448-524.) As such, the evidence at trial only supports the conclusion that Yaschik believed the building was totally destroyed and was justifiably pursuing its rights under the master lease.

The fact that the jury ultimately concluded that the property was not totally destroyed by fire does not alter this conclusion. On this point, the case of *Toys "R" Us v. NBD Trust Co.*, 904 F.2d 1172 (7th Cir. 1990), is instructive. In that case, the lease between the landlord and the tenant provided that the tenant could sublease the premises, subject to the landlord's consent, which could not be unreasonably withheld. *Id.* at 1176. The landlord refused the tenant's request to sublease the premises, and the tenant sued for breach of contract and interference with its contract to sublease the premises. *Id.* at 1175. The court ruled that the trial court properly granted summary judgment on the tenant's interference claim because the landlord was legally justified in refusing to consent to the sublease because it was acting to protect its interest as the owner of the premises. *Id.* at 1178. Significantly, though, the court ruled that the issue of whether the landlord breached the contract by unreasonably withholding consent was a jury issue. *Id.* at 1177-78. Thus, according to the court, the landlord's reliance on debatable language in the lease to withhold consent was reasonable and could not form the basis of an interference claim even if such reliance could constitute a breach of contract. *Id.* at 1178.

Like the landlord in *Toys "R" Us*, Yaschik merely invoked a provision of the master lease that resulted in alleged interference with a sublease agreement. The trial court's ruling that the provision in question – Section 20 – was ambiguous and that there was a jury issue of whether that provision was breached dictates that Yaschik's termination of the master lease was not *per se* unreasonable. Even if Yaschik mistakenly concluded the building was "totally destroyed," it was

legally justified in doing so. Therefore, there was no evidence to support the necessary element that Yaschik lacked justification in terminating the master lease.

To avoid this result, Top of the Bay presented evidence which it claims shows that Yaschik was motivated by a prospective deal to sell 213 East Bay Street to East Bay Company in an attempt to show an improper purpose by Yaschik. According to Top of the Bay, the premises was more valuable free and clear of the Master Lease and the subleases, and Yaschik took actions to terminate those leases to maximize its profits from the sale of the building to East Bay Company. Yaschik disputed these arguments. But even when this evidence is construed in a light most favorable to Top of the Bay, Yaschik's actions would be justified based on its economic interest in the building and master lease.

Judicial decisions from across the country recognize that a landlord has a sufficient interest to interfere with a sublease or a prospective or actual lease assignment. These cases hold that "where there is a direct financial interest in a contract, the essential question in determining if interference is justified is whether the person's conduct is motivated by a desire to protect his economic interest, or whether it is motivated by spite, malice, or some other improper objective." *Bendix Corp. v. Adams*, 610 P.2d 24, 31 (Ak 1980). Thus, even where a landlord interferes with a sublease or potential sublease or assignment for his own economic gain, such interference is justified based on the landlord's desire to protect his economic interest. *See, e.g., Bergfeld v. Stork*, 7 Ill.App.3d 486, 288 N.E.2d 15 (Ill. Ct. App. 1972) (landlord's interference with lease assignment to obtain higher rent from another tenant "was not inconsistent with a good faith purpose, since he was the owner of the property"); *Ran Corp. v. Hudesman*, 823 P.2d 646, 649-50 (Ak 1991) (stating that landlord's termination of lease based on knowledge of a more profitable use of property justified landlord's interference with tenant's separate contract to assign the lease). Therefore,

even if Yaschik terminated the master lease to maximize its return on the sale of the premises, its termination was legally justified.

To avoid this result on Yaschik's motion for JNOV, the trial court stated that there was evidence suggesting that Yaschik acted in bad faith in determining that the premises were totally destroyed, which would support the jury's verdict and the finding that Yaschik lacked justification in terminating the master lease. Assuming that this accurate, there is no evidence, though, that Yaschik's decision was motivated by anything other than its own economic interest. The mere fact that Yaschik's economic interests and Top of the Bay's economic interests were not aligned cannot convert a legitimate business decision into an intentional tort. Thus, Yaschik was entitled to directed verdict and JNOV on Top of the Bay's claim of intentional interference with contractual relationship.

II. The jury's punitive damages award was improper and contrary to law.

A. Standard of Review

"In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135. "The trial judge has considerable discretion regarding the amount of damages both actual or punitive awarded." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000). Because of this discretion, the appellate court's review on appeal "is limited to the correction of errors of law." *Id.*

B. Top of the Bay failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of its rights.

The jury awarded Top of The Bay $1.00 in nominal damages and $133,333.33 in punitive damages. (R. p. 123.) Yet, the punitive damages award was not proven by clear and convincing evidence, and it was grossly excessive, contrary to law, and violated Yaschik's due process rights.

Yaschik is entitled to a new trial, or, in the alternative, a reduction of the award of punitive damages.

The award of punitive damages was improper because there was no evidence that Yaschik's actions were willful, intentional, or with reckless disregard of Top of the Bay's rights. "In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011); S.C. Code Ann. § 15-33-135 ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence"); *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004) ("On the issue of punitive damages, the highest burden of proof known to the civil law is applicable."). Further, "[t]he test by which a tort is to be characterized as reckless, willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 (quotation omitted). In sum, "[i]t is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor . . . ." *Id.* (citation omitted).

The evidence at trial showed that Mr. Ervin did not have a present consciousness of wrongdoing when he declared the building totally destroyed. Rather, Mr. Ervin was acting pursuant to a contractual right and on the recommendation of engineers, contractors, and insurance professionals. Mr. Ervin believed the building to be totally destroyed and that it was impossible to repair what was left of the structure. Mr. Ervin testified as follows with regard to declaring the building totally destroyed:

> Q. Was it a personal decision to declare this building totally destroyed or was it a business decision?

A. It was a business decision.

Q. Will you please tell this jury exactly what you based that business decision on when you sent the letter on September the 11, 2013.

A. Well, I considered it a total loss. We lost complete use of the building, and for an economic reconstruction to occur, there had to be a total rebuild, and that's where I thought we were.

(R. p. 423, lines 3-12.)

Furthermore, all parties testified that they did not believe that Yaschik was trying to defraud or harm anyone. For example, when FLP's president, Mike Quillen, was asked at trial if he thought Mr. Ervin was trying to defraud him, Mr. Quillen stated, "I wouldn't use the word defraud . . . As I testified earlier, what Tom chose to do -- and it was a business decision." (R. p. 412, line 23-p. 413, line 6.) Similarly, Squeeze's president, Clint Gaskins, testified as follows when asked if he thought Mr. Ervin ever tried to deceive Squeeze:

Q. Mr. Gaskins, you don't think Tom Ervin or anybody associated with Yaschik Development ever deceived Sea Island Food Group, do you?

A. To my knowledge, prior to that letter, no.

Q. You don't think you were misled by Tom Ervin prior to September 11, 2013, do you?

A. It would be kind of hard to be misled when we haven't had any conversations to that point.

(R. p. 321, lines 5-12.) Additionally, Kelly Tant, the owner of Top of the Bay, submitted an affidavit declaring the building had been totally destroyed. (R. pp. 448-524.) Thus, evidence and trial testimony demonstrate that Top of the Bay failed to meet the clear and convincing burden of proof necessary to justify punitive damages. As such, the award of punitive damages should be reversed.

C. Top of the Bay's award of punitive damages violates Yaschik's due process rights.

When a party challenges the constitutionality of the amount of punitive damages, the court is "required to determine whether the award of punitive damages . . . is consistent with due process." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011). Such a determination requires the court to determine whether the award was reasonable in light of the following guideposts:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. Applying these factors to the facts of this case demonstrates that the jury's award was unreasonable and not consistent with due process.

i. Reprehensibility

"The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citations omitted). In determining the degree of reprehensibility, the court is required to analyze whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Hollis, 394 S.C. at 396, 714 S.E.2d at 911; see *also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 576 (1996). Notably, "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them

renders any award suspect." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 143, 682 S.E.2d 877, 889 (Ct. App. 2009) (citation omitted).

The first factor favors Yaschik as the jury found that its actions did not cause any actual injury to Top of the Bay. To the extent that any injury resulted, it was purely economic. Top of the Bay never alleged any physical harm from Yaschik's actions, and the only damages sought by Top of the Bay were alleged lost profits. (R. p. 197, ¶ 71). Thus, even if Top of the Bay could have proven any actual damages, those damages would weigh against reprehensibility. *See Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 589, 686 S.E.2d 176, 186 (2009) (stating that a finding of only economic harm "typically weigh[s] against the reprehensibility").

The second factor also weighs in favor of Yaschik. It was neither alleged nor proven at trial that Yaschik's conduct evinced an indifference to or a reckless disregard for the health or safety of others. South Carolina law states that "when evaluating the degree of a defendant's reprehensibility in a post-trial review of the award, the defendant's reprehensibility is not enhanced pursuant to this second consideration unless it involves the reckless disregard for the health or safety of people." *Hollis*, 394 S.C. at 398, 714 S.E.2d at 912. Yaschik's conduct was not indifferent or reckless to the health or safety of people. In fact, Yaschik's decision to declare the building totally destroyed and completely rebuild it in compliance with modern building codes increased public safety. (R. p. 425, lines 4-21.) Therefore, this factor favors a lesser degree of reprehensibility.

With respect to the third factor, the trial court erred as a matter of law in its post-trial review by making a conclusory finding that Top of the Bay was financially vulnerable. In denying Yaschik's post-trial motions, the trial court held that the third factor weighed in favor of finding reprehensibility because: (1) Top of the Bay "was a small business bar owners whose livelihood

depended on the success of [the bar]"; (2) "the complained of conduct . . . directly impacted their financial vulnerability"; and (3) Top of the Bay was financially vulnerable as a result of its relationship as subtenant and Yaschik as building owner. (R. pp. 12-13.)

This analysis contravenes well established case law regarding the financial vulnerability prong. Top of the Bay was not financially vulnerable purely as a result of being the subtenant of Yaschik. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th Cir. 2006) (providing purchaser of a vehicle was not financially vulnerable simply because the car manufacturer has substantial financial resources). Rather, Top of the Bay and Yaschik existed in an owner-subtenant relationship for years with no evidence of financial vulnerability. Further, South Carolina case law typically only finds financial vulnerability for poor or ill individuals. *See Cody P.*, 395 S.C. at 629, 720 S.E.2d at 483 (holding that a fatherless special needs child was financially vulnerable); *Mitchell*, 385 S.C. at 589, 686 S.E.2d at 186 (finding that an HIV positive teenager was financially vulnerable). Top of the Bay is a business and there was no evidence presented at trial that its owners were poor or ill.

Additionally, Top of the Bay's status as a small business owner is not evidence of financial vulnerability. *See Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 472, 870 N.E.2d 303, 314 (2006) ("[the] fact that [defendant] is a 'small business' does not, by itself, prove financial vulnerability"). Testimony and evidence admitted at trial showed that Kelley Tant, Top of the Bay's owner, made $118,000.00 in 2011, and $196,771.86 in 2012. (R. p. 374, line 19-p. 375, line 16; p. 389, lines 17-19.) As such, although Top of the Bay was technically a small business, its owner earned significant income and was not financially vulnerable. *See Wallace v. Poulos*, 861 F.Supp.2d 587, 605 (D. Md. 2012) ("Plaintiffs here also were not financially vulnerable, as [plaintiff] earns a significant annual salary...").

Even assuming *arguendo* that Top of the Bay was financially vulnerable, the third factor still does not support a finding of reprehensibility. Case law throughout the country provides that the financial vulnerability of a plaintiff only "play[s] an important role in cases where the defendant targeted a plaintiff's financial vulnerability." *Quest Servs. Corp. v. Blood*, 252 P.3d 1071, 1096 (Colo. 2011); *Kemp v. AT&T*, 393 F.3d 1354, 1363 (11th Cir. 2004) (finding that AT&T's fraudulent conduct targeted customers who were "unsophisticated and economically vulnerable"); *Dziadek v. Charter Oak Fire Ins. Co.*, 213 F.Supp.3d 1150, 1171 (D.S.D. 2016) (providing the third prong weighs in favor of reprehensibility when the defendant has knowledge of the plaintiff's financial vulnerability when taking the underlying actions). Here, Top of the Bay presented no evidence that its financial vulnerability, if any, played a role in Yaschik's decision to terminate the master lease.

As to the fourth consideration, the trial court misapplied the facts in determining that Yaschik's negotiations with East Bay Company constituted repeated conduct. The trial court stated the reason the fourth prong favored Top of the Bay was because "the evidence indicated the negotiations with [East Bay Company] occurred over a period of months." (R. p. 13.) However, Yaschik's negotiations with East Bay Company was not the conduct that supported Top of the Bay's intentional interference claim. Rather, it was Yaschik's termination of the master lease, a one-time occurrence, that gave rise to liability. Additionally, no evidence was presented at trial showing that Yaschik engaged in similar contractual interference with subtenants for other properties. Thus, the fourth prong favors Yaschik.

Finally, as to the fifth consideration, any harm suffered by Top of the Bay was not the result of intentional malice, trickery, or deceit. In *Hollis*, the Court of Appeals held that the fifth factor weighed in favor of reprehensibility because the defendant "made repeated promises to the

[plaintiffs] that it would fix the problems caused by its development, but failed to take any meaningful steps to fulfill those promises." *Hollis*, 394 S.C. at 399, 714 S.E.2d at 912. The court gave a specific example of the deceitful conduct, by which the defendant promised a conservation easement consisting of a fifty-foot buffer of trees, but then clear cut the trees to receive a $1,000,000 tax deduction. *Id.*

In this case, no evidence was produced at trial that Yaschik intended malice towards Top of the Bay or ever attempted to deceive or harm them. The evidence actually showed that Mr. Ervin demanded that the subtenants be provided for in any potential sale of the property. (R. p. 318, line 6-p. 320, line 10; pp. 540-541; R. p. 612.) Furthermore, Yaschik's action were in no way deceitful when compared to those of the defendant in *Hollis*. Mr. Ervin was upfront from the start with Mr. Quillen telling him that Yaschik was in talks with Hilton Smith to sell the property. (R. p. 363, lines 10-24.) Even Mr. Quillen was in talks to purchase the property from Yaschik at one point. (R. p. 363, line 25-p. 364, line 9.) Moreover, the jury declined to rule that Yaschik committed a fraudulent act when it ruled in favor of Yaschik on FLP's breach of contract accompanied by a fraudulent act claim. (R. p. 122.) Thus, the fifth factor weighs in favor of Yaschik because there was no evidence of intentional malice, trickery, or deceit.

Ultimately, the reprehensibility factors are lacking, and their absence "renders any award suspect." *See Duncan*, 385 S.C. at 143, 682 S.E.2d at 889 (citation omitted). Accordingly, Yaschik's conduct was not sufficiently reprehensible to support the punitive damages awarded and the award should be reversed.

ii. Disparity between actual or potential harm and the punitive damages award

The second guidepost the court must examine in determining whether the punitive damages award violates due process is the disparity between the actual or potential harm and the punitive

damages award. *Hollis*, 394 S.C. at 396, 714 S.E.2d at 911. The South Carolina Supreme Court has previously stated that, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, a court may consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.* at 399, 714 S.E.2d at 912 (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185). It should be noted, however, that "a court may not rely upon these considerations to justify an otherwise excessive punitive damages award." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185.

As to the first consideration, deterrence, Yaschik was the biggest loser financially from the fire out of all the parties involved in this lawsuit. Yaschik lost five to six years of income from the building, must pay the damages awards and legal expenses from the lawsuit, and also is responsible for paying to reconstruct the building after it was demolished. This multi-million dollar loss more than suffices as punishment without additional punitive damages being added. In addition, to the extent punitive damages are intended to punish Yaschik, Yaschik is owned by a charitable foundation, and no one at Yaschik gains personally from any profits it makes. (R. pp. 349-350.) Punitive damages in excess of any actual damages suffered by Top of the Bay only function to reduce the money going to charity.

The second consideration is "whether the award is reasonably related to the harm likely to result from such conduct." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. Notably, the United States Supreme Court "has consistently pointed out that a reasonable relationship between punitive and actual damages must exist." *Duncan*, 385 S.C. at 145, 682 S.E.2d at 890. Further, the Court has stated "in practice few awards exceeding a single-digit ratio between punitive and compensatory

damages will satisfy due process." *Id.* (citing *State Farm*, 538 U.S. at 425). "In the end, a general concern of reasonableness drives [the] inquiry." *Id.* at 146, 682 S.E.2d at 891.

The ratio of punitive damages the jury awarded to Top of the Bay was 133,333.33 to 1. Such a ratio far exceeds any ratio that a court in this state has ever awarded, or upheld. By way of comparison, in a case involving a ratio of 127 to 1, the South Carolina Supreme Court stated that "such a sizable disparity between punitive and compensatory damages establishes a presumption that the punitive damages award is an unconstitutional deprivation of property." *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 170, 604 S.E.2d 385, 392 (2004).

Finally, with regard to the third consideration, although Yaschik has the ability to pay the punitive damages, it is important to note "that trial courts must be careful about considering the net worth of the defendant." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 n. 8. Specifically, "[w]ealth cannot justify an otherwise unconstitutional punitive damages award. While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth." *Id.*

iii. Comparative penalty awards

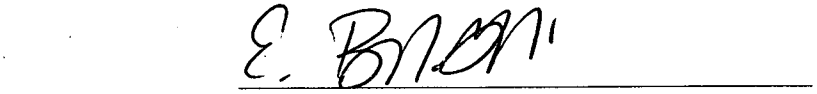
The third guidepost is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Hollis*, 394 S.C. at 402, 714 S.E.2d at 914. There are no authorized civil penalties applicable to this situation. However, there are five reported opinions in South Carolina in which punitive damages were upheld for tortious interference with contractual relations. *See Vortex Sports,* 378 S.C. at 203, 662 S.E.2d at 448 (finding a 4.4 to 1 ratio was proper); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 144, 584 S.E.2d 120, 130 (Ct. App. 2003) (finding a 9.9 to 1 ratio was proper); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993) (finding a 4.8 to 1 ratio was proper);

Collins v. Terry, 303 S.C. 358, 400 S.E.2d 783 (Ct. App. 1991) (finding a 6 to 1 ratio was proper); *Todd v. S. C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 474 (1985) (reinstating a 1.5 to 1 ratio of punitive damages). Notably, the highest ratio found not to be excessive for a comparable cause of action in South Carolina is 9.9 to 1. Top of the Bay's ratio far exceeds the previous high at 133,333.33 to 1 and is an obvious outlier.

In sum, Yaschik's conduct was not sufficiently reprehensible for punitive damages to be awarded, especially when considering the jury found that Yaschik did not have a fraudulent intent when it declared the master lease was terminated. (R. p. 122.) There is also a significant level of disparity between the actual and potential harm suffered by Top of the Bay and the amount of punitive damages awarded by the jury. Further, the jury's award of punitive damages is not in accord with those awarded in comparable cases. As such, the punitive damages awarded by the jury were unconstitutional, and Yaschik is entitled to a new trial, or, in the alternative, a reduction of the award of punitive damages.

CONCLUSION

For the foregoing reasons, Yaschik requests that the Court reverse and remand the case to the trial court for further proceedings.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2018-000906

Sea Island Food Group, LLC, d/b/a Squeeze ..... Plaintiff,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, Hilton Smith, East Bay Company, Ltd., Michael J. Quillen Family Limited Partnership..... Defendants,

Michael J. Quillen Family Limited Partnership .....Third-Party Plaintiff,

v.

Top of the Bay, LLC ..... Third-Party Defendant

Top of the Bay, LLC d/b/a Club Light..... Fourth-Party Plaintiff, Respondent,

v.

Yaschik Development Company, Inc., d/b/a Yaschik Enterprises.....Fourth-Party Defendant, Appellant.

CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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