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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 12, 2021.

QUESTIONS PRESENTED

1. Whether a plaintiff can prove a claim of tortious interference with contractual relations by showing that the defendant rendered the performance of the contract impossible instead of intentionally procuring a breach of the contract?

2. Whether a defendant is legally justified in interfering with the plaintiff's contract with a third-party when the interference results from the defendant's termination of its own contract with the third-party in pursuit of the defendant's financial interest?

3. Whether a ratio between punitive damages and nominal damages of 133,333:1 is presumptively unconstitutional under *Atkinson v. Orkin Exterminating Co., Inc.* and *State Farm Mut. Auto. Ins. Co. v. Campbell*?

4. Whether the Court of Appeals erred in upholding the constitutionality of the punitive damages awarded to Respondent regardless of whether the "ratio" test applies?

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 against Yaschik causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and intentional interference with a contractual relationship 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 a counterclaim against FLP for breach of the sublease based on FLP's failure to restore the fire-damaged premises and terminating it instead. (R. pp. 187-198.) Top of the Bay also 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. (*Id.*)

The case was tried before a jury over two weeks in January and February of 2018. After the close of the evidence, the trial court directed verdict on Top of the Bay and Squeeze's breach of contract claims against FLP. (R. pp. 72, line 16-p. 73, line 10.) According to the trial court, Top of the Bay and Squeeze could not prevail on their breach of contract claims 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 [sic], 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-p. 90, line 1.) However, despite finding no contractual duty under the subleases that FLP could have breached, the trial court denied Yaschik's motion for directed verdict on Top of the Bay and Squeeze's interference claims. (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 verdict ("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 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 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 unconstitutional and excessive award of punitive damages. (R. pp. 219-237.)

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[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.

Last, Yaschik argued the trial court should reduce the excessive nature of the jury's award of damages. (R. pp. 237-240.)

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 its obligations under the sublease due to the termination of the master lease inherently entailed the breach of the subleases and that the issue of whether Yaschik was justified in interfering with the subleases 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. (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 appeal, Yaschik argued that the trial court should have directed verdict and granted the JNOV motion on the interference claim because (1) the trial court's ruling in favor of FLP on Top of the Bay's breach of contract claim precluded any breach of the sublease, which was an essential element of Top of the Bay's interference claim against Yaschik, and (2) Yaschik was legally justified in interfering with the sublease because it was pursuing its legitimate business interests in terminating the master lease. Yaschik also asserted that the jury's award of punitive damages failed to comport with the requirements of due process.

The Court of Appeals denied Yaschik's appeal on January 27, 2021. Yaschik petitioned for rehearing on February 11, 2021, arguing, among other things, that the Court of Appeals had mistakenly relied on and interpreted prior precedent. On May 12, 2021, the Court of Appeals withdrew its prior opinion and substituted it with a new decision. Although the new decision corrected the Court of Appeals' mistaken application of authority in its original opinion, it maintained its decision affirming the trial court's decision below.

II. Statement of the Facts

Yaschik purchased 213 East Bay Street in 2003 and received an assignment of the existing master lease between the former owner and then existing tenant. (R. p. 323, line 22 – p. 324, line 6.) The master lease required the tenant to maintain $1 million in liability insurance coverage and separate "fire and extended insurance coverage." (R. p. 346, lines 15-22; 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 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 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 $1 million 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, Michael J. Quillen, FLP’s general partner, spearheaded the process to secure and rebuild the building, which included engaging an engineering firm to design the restoration. (R. p. 348, lines 1-17; p. 420, lines 1-17.)

Shortly after the fire, Mr. Quillen emailed the limited partners of FLP and several employees of the engineering firm, 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 FLP and its engineering firm undertook the process of redesigning and restoring the property, East Bay Company, which owned other properties in the area, approached Yaschik in May of 2013 about purchasing 213 East Bay Street. (R. p. 360, line 17-p. 361, line 10.) Yaschik proposed a price 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, the engineers 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, it was not up to the current building code. (R. p. 419, lines 5-16.) As a result of the significant damage to the building, any repairs or restoration of the property would have to comply with the 2012 earthquake code. (R. p. 398, lines 11-25.) According to the engineer who later took over the design of the rebuild, bringing the property up to seismic code requirements was an "absurd task" that was neither cost effective nor feasible. (R. p. 424, lines 10-20.)

In June of 2013, Mr. Quillen updated Yaschik 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 said that more analysis would be needed before an accurate estimate of the total reconstruction costs could be obtained 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 Yaschik a final design. (R. p. 352, lines 9-17.)

In early August of 2013, Mr. Quillen provided Yaschik with another update, this time explaining 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 update 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, Yaschik 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 updated Yaschik with his estimate for 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 already incurred on engineers and contractors to shore the building, it could cost an additional $1.5-$1.8 million to rebuild. (R. pp. 545-564; p. 525; pp. 613-622; p. 353, line 10-p. 355, line 10.) Mr. Quillen also 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 at only $1,000,000, which was later fully paid by the insurer. (R. p. 329, lines 17-20; p. 344, lines 4-8; pp. 527-530.)

Finally, on September 3, 2013, Mr. Quillen, for the first time, advised Yaschik that "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 and the contractor for permitting and 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 responsibility for overseeing the redesign and restoration of the property, Yaschik was forced to evaluate the various options relating to the restoration of property and its obligations under the master lease. (R. p. 356, line 7-p. 358, line 9.) Due to the requirement of bringing the property up to current building codes, it was more economical to demolish the property and completely rebuild it. (*Id.*) Thus, Yaschik considered the property totally destroyed and terminated the master lease. (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, Yaschik advised FLP of the decision to terminate the master lease, explaining that because "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; ; p. 356, lines 2-6.) 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.) 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 it 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 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.) Yaschik 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 undertook 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.)

STANDARD OF REVIEW

Rule 242, SCACR, sets forth the circumstances which weigh in favor of the Supreme Court issuing a writ of certiorari to review a decision of the Court of Appeals. Among those circumstances are novel questions of law and where the decision of the Court of Appeals conflicts with a prior decision of the Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (outlining reasons for granting certiorari and standards for this Court to grant the same). Rule 242(b), SCACR, makes clear that the Court is not limited by the stated reasons within the rule as those reasons do not fully measure this Court's discretion or power to review a case.

ARGUMENT

I. THE SUPREME COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF APPEALS' DECISION EXPANDING THE ESSENTIAL ELEMENT OF A CONTRACTUAL INTERFERENCE BY ALLOWING A PLAINTIFF TO PROVE THAT THE DEFENDANT RENDERED PERFORMANCE OF THE CONTRACT IMPOSSIBLE IN LIEU OF REQUIRING PROOF THAT THE DEFENDANT PROCURED A BREACH OF THE CONTRACT.

The Supreme Court should grant certiorari because the Court of Appeals decision conflicts with prior decisions of this Court establishing that an essential element of a claim for tortious interference with contract is the intentional procurement of the contract's breach. Specifically, the Court of Appeals ruled that "[t]he 'breach' part of Top [of the Bay's] interference claim did not require the trial court to find that the Master Tenant was responsible for repairing the building and that the Master Tenant breached that promise. The 'breach' element could stand as long as there was evidence Yaschik's declaration of a total loss kept the Master Tenant from honoring the sublease." (Op. p. 6.) In other words, the Court of Appeals ruled that Top of the Bay could establish a contractual interference claim if Yaschik's conduct made it impossible for FLP to perform the sublease regardless of whether Yaschik procured FLP's breach of the sublease.

This ruling directly conflicts with this Court's ruling in *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007). In that case, the Court explained that 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." *Id.* at 481, 642 S.E.2d at 732. Thus, the Supreme Court has adopted a bright-line rule requiring a breach without acknowledging any exceptions for rendering the contract impossible to perform.

As argued by Yaschik on appeal, 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 under this Court's decision in *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004). 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.

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 claim 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.

The Court of Appeals rejected this argument by ruling that Top of the Bay could establish the breach element by merely showing that Yaschik's termination of the master lease prevented FLP from honoring the sublease. In so doing, the Court of Appeals effectively expanded the essential elements of a contractual interference by allowing a claim to stand without a breach of the underlying contract if the defendant renders performance of the contract impossible.

Although courts from other jurisdictions have adopted such an exception,[2] this Court has not. In this regard, the Supreme Court's jurisprudence on contractual interference is consistent with New York law insofar as it requires a breach as an essential element. In *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614 (1996), the New York Court of Appeals made clear that New York law does not permit a claim for interference with contractual rights in the absence of a breach:

> [Plaintiff] urges that, as a matter of precedent and policy, a defendant's deliberate interference with plaintiff's contractual rights that causes damage should be punishable as tortious interference whether or not the contract was actually breached.
>
> New York law is to the contrary. Even since tortious interference with contractual relations made its first cautious appearance in the New York Reports – decades after the seminal case *Lumley v. Gye* (2 El & Bl 216, 118 Eng Rep 749 [1853]) – our Court has repeatedly linked availability of the remedy with a breach of contract. Indeed, breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations.

Id. at 621 (citations omitted). Thus, New York courts have expressly rejected what the Court of Appeals ruled in this case: a tortious interference with contract claim may be premised on a theory that the defendant committed an act that rendered performance of a contract impossible. *See, e.g., Fonar Corp. v. Magnetic Resonance*

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[2] *See, e.g., ECCO Plains, LLC v. United States*, 728 F.3d 1190, (10th Cir. 2013) (stating that claim for intentional interference with contract requires a party to prove that the defendant induced a party to breach or made it impossible for the party to perform the contract); *Fashions, Inc. v. Spurney*, 538 So. 2d 228, (1989) (recognizing claim for tortious interference with contract includes element that defendant induced or caused party to breach contract or intentionally rendered performance impossible or more burdensome).

Plus, Inc., 957 F. Supp. 477, 480-81 (S.D.N.Y. 1997) (holding that a defendant's rendering performance of a contract impossible does not constitute tortious interference with contractual relations); *Marzullo v. Beekman Campanile, Inc.*, 10 Civ. 0364 (PGG), 2011 U.S. Dist. LEXIS 81526 (S.D.N.Y. 2011) (dismissing contractual interference claim based on allegation that defendant rendered performance of the contract impossible).

Like New York law, South Carolina law on contractual interference has "its genesis in the early English case of *Lumley v. Gye*." *Chitwood v. McMillan*, 189 S.C. 262, 266, 1 S.E.2d 162, 163 (1939). In *DeBerry v. McCain*, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981), the Supreme Court first articulated the specific elements of a claim for interference with contractual relations and expressly included the "intentional procurement of [the contract's] breach" as an essential element. Since then, this Court has continued to require procurement of a breach as an essential element of a contractual interference claim without exception.

In this case, the Court of Appeals disregards this precedent by expanding the "breach" element of the tort to include conduct that renders a party's performance of the contract impossible – regardless of whether a breach occurred. In so doing, the Court of Appeals overstepped its authority. Therefore, the Court should grant certiorari to correct the conflict with its existing jurisprudence on contractual interference and clarify that procurement of a breach is an essential element of the claim that must be proved.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI TO ADDRESS THE NOVEL QUESTION OF WHETHER A DEFENDANT IS LEGALLY JUSTIFIED IN INTERFERING WITH THE PLAINTIFF'S CONTRACT WITH A THIRD-PARTY WHEN THE INTERFERENCE RESULTS FROM THE DEFENDANT'S TERMINATION OF ITS OWN CONTRACT WITH THE THIRD-PARTY IN PURSUIT OF THE DEFENDANT'S FINANCIAL INTEREST.

The Court should also grant certiorari to address the novel question of what standard governs and what factors must be considered under the element of absence of justification in a contractual interference claim, especially in the context of the alleged interference resulting from the defendant's termination of its own contract. Although the Supreme Court has repeatedly recited the absence of justification as an essential element of the claim that a plaintiff must prove, there has been little discussion of the element in reported cases from either the Supreme Court or the Court of Appeals. In fact, the Court of Appeals recognized the lack of guidance on this issue by stating that it "could not find a South Carolina case directly on point." (Op. p. 7.)

In this case, there is no dispute that Yaschik's decision to terminate the master lease was based, at least in part, on legitimate economic considerations. It is undisputed that the building suffered significant fire damage, required costly improvements to comply with modern earthquake building code requirements, and was grossly underinsured by the master tenant. According to the Court of Appeals, this evidence indicated that Yaschik "terminated the master lease (as well as the subleases) out of a desire to protect and advance its own interests." (Op. p. 6.)

Nevertheless, the Court of Appeals ruled that acting from such a desire could not constitute legal justification under a claim for contractual interference.

In reaching this conclusion, the Court of Appeals disregarded well-established law from other jurisdictions generally holding interference with another party's contractual relations is privileged or justified where it results from the defendant's pursuit of its own economic interest. As one court has stated, "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). If this rule had been applied, then there would be no doubt that Yaschik's termination of the master lease was legally justified, thereby precluding a finding of liability on Top of the Bay's contractual interference claim.

Yet instead of applying the precedent from other jurisdictions cited by Yaschik on appeal, the Court of Appeals generally cited the *Restatement (Second) of Torts* § 767 (1979) as support for its ruling. On its face, there is nothing improper about the Court of Appeals' reliance on the Restatement as guidance for determining whether Yaschik's purported interference was justified. However, a closer look at the factors discussed in § 767 of the Restatement of Torts reveals that it offers little, if any, support for the Court of Appeals' conclusions on justification. *See Bendix Corp.*, 610 P.2d at 30 (stating that "the comments and bulk of cases citing § 767 deal with torts

by competitors and are of little help here").[3] In fact, the Court of Appeals applied none of the factors from the Restatement in its analysis of whether Yaschik was justified in its actions. As a result, its decision requires clarification to determine whether and to what extent that § 767 of the Restatement applies, especially considering that this Court has never applied § 767 and other courts have refused to apply it in cases similar to this one where a party is undisputedly acting to protect its own financial interest.

The issues surrounding justification in this case are especially novel because the purported interference arises from the defendant's termination of its own contract. Yaschik argues that it was justified in terminating the master lease because all parties have an inherent right to terminate a contract that is no longer advantageous. *See Tri Cnty. Wholesale Distribs. v. Labatt USA Operating Co.*, 828 F.3d 421, 429 (6th Cir. 2016) (stating that "contracting parties also have an inherent right to breach a contract that is no longer advantageous, committing what economists call an efficient breach[]"); *Cf. Lewis v. L.B. Dynasty*, 411 S.C. 637, 645, 770 S.E.2d 393, 397 (2015) (stating that "in any relationship there exists some right to terminate the arrangement[]").

[3] The Court of Appeals also cites *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59 (4th Cir. 1993), in its discussion of justification. Yet, like § 767 of the Restatement, *Waldrep Bros. Beauty Supply* has little applicability to this case because that case involves an alleged tort by a business competitor. To the extent it does apply, it reinforces Yaschik's argument that actions in pursuit of the defendant's financial interests are legally justified. *Id.* at 63 (citing Restatement (Second) of Torts § 768 for the proposition that interference is not improper if the defendant's "purpose is at least in part to advance his interest in competing with the other").

In other words, if Yaschik terminated the master lease because it was economically advantageous to do so, as the Court of Appeals contends, such termination would constitute an efficient breach. This doctrine holds that "if a party breaches, and is still better off paying damages to compensate the victim of the breach, the result is *pareto superior*, that is considered as a unit, the parties are better off because of the breach and the breach makes no party worse off." 11 *Corbin on Contracts* § 55.15. In fact, efficient breaches are encouraged, and the doctrine has been uniformly adopted among the jurisdictions. *Allapattah Servs. v. Exxon Corp.*, 61 F. Supp. 2d 1326, 1329 (S.D. Fla. 1999) (collecting cases). The law recognizes that efficient breaches are, by definition, made to advance the legitimate economic interests of the breaching party. Therefore, efficient breaches should be considered legally justified or privileged from a contractual interference claim.

This issue is one of first impression in South Carolina, but other courts have recognized an efficient breach defense to claims for interference with contractual relations. *See, e.g., Celtig, LLC v. Patey*, 347 F. Supp. 3d 976, 987-88 (D. Utah 2018) (holding that defendant's efficient breach of its own contract cannot support a tortious interference with economic relations action); *NACCO Indus. v. Applica Inc.*, 997 A.2d 1, (Del. Ch., May 7, 2008) (dismissing conspiracy to engage in tortious interference with contract claim because it would undermine efficient breach doctrine). Although Yaschik argued that this defense should be recognized under South Carolina law, the Court of Appeals rejected the argument in conclusory fashion with one line: "At bottom, we simply disagree with Yaschik's argument that breaching a contract (and

interfering with other agreements) because the contract looks less profitable than desired precludes an intentional interference claim." (Op. 6.)

Yaschik's argument deserves a more thorough examination before it can be dismissed out of hand as the Court of Appeals did. The issue has important public policy and legal implications that go beyond the particular interests of the parties in this case. The resolution of this issue will potentially impact not only landlord/tenant/subtenant relationships but also any situation where a party's decision to terminate its own contract can affect interested third-parties. Under traditional contract law principles, a party to a contract can quantify the potential liability for terminating or breaching a contract and determine whether it is advantageous to do so. However, the Court of Appeals' decision in this case exposes the party to additional liability from subcontractors, subtenants, or others who may have an economic interest in the performance of the contract, thereby making it more difficult to calculate the economic costs of the breach. More problematically, the party will be exposed to potential punitive damages, which cannot be quantified and are otherwise unavailable to the other contracting party[4]. The uncertainty created by these possibilities will make it impossible to determine if a contemplated breach is efficient and advantageous, thereby undermining the efficient breach doctrine and the predictability favored under contract law.

[4] This case perfectly illustrates the incongruity of the Court of Appeals' decision. Although Yaschik's termination of the master lease directly impacted FLP, FLP was limited to actual damages and could not seek punitive damages for the breach. In contrast, Top of the Bay was able to seek punitive damages for Yaschik's termination of the master lease despite no contractual relationship between the parties.

Overall, the Court of Appeals decided the issues relating to justification with little analysis and without the benefit of clear guidance from the Supreme Court. To ensure that contracting parties can accurately analyze the potential consequences of breaching a contract and govern their conduct accordingly, the Supreme Court should grant certiorari to resolve the novel issues surrounding justification presented by this case.

III. THE SUPREME COURT SHOULD GRANT CERTIORARI TO ADDRESS THE NOVEL QUESTION OF WHETHER THE RATIO TEST FOR REVIEWING THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD APPLIES WHEN THE JURY AWARDS ONLY NOMINAL DAMAGES.

The Supreme Court should also grant certiorari to address the Court of Appeals' affirmance of the punitive damages awarded to Top of the Bay. The punitive damages awarded in this case raise substantial concerns that Yaschik's due process rights were violated. This case also raises novel issues of law regarding punitive damages because this Court has never addressed the standard for determining the constitutionality of punitive damages where the jury awards only nominal damages and no actual damages. Last, certiorari should be granted because the Court of Appeals' decisions conflicts with this Court's decision *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 171, 604 S.E.2d 385, 393 (2003).

This Court and the United States Supreme Court have "consistently pointed out that a reasonable relationship between punitive and actual damages must exist." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 145, 682 S.E.2d 877, 890 (2009) (citing *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 572 (1996)). Further, the Court has stated "in

practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Duncan,* 385 S.C. at 145, 682 S.E.2d at 890 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003)). In fact, there does not appear to be any cases decided since *Campbell* in which this Court has upheld a punitive damages award with a double-digit ratio.

In this case, the jury awarded Top of the Bay $1 in nominal damages and $133,333 in punitive damages but no actual damages. The Court of Appeals upheld this award, finding it neither excessive nor disproportional despite the Supreme Court's ruling in *Duncan*. Instead of relying on cases from this Court, the Court of Appeals relied on various "federal cases [that] have found that a 'ratio test' is inapplicable in cases that involved nominal damages." (Op. p. 9.) Because this Court has never addressed the issue of whether the "ratio test" for punitive damages applies in cases involving only nominal damages, the Court should grant certiorari to decide if it is applicable and, if not, what standard applies for determining whether a punitive damages award is excessive or disproportional.

More specifically, the Court should determine whether the presumption of unconstitutionality announced in *Atkinson* applies when only nominal damages have been awarded. In that case, the jury awarded the plaintiff a relatively low amount of compensatory damages but awarded punitive damages at a ratio of 127:1. *Id.* The Supreme Court recognized that the amount of compensatory damages in that case "was particularly low," but it nevertheless ruled that the plaintiff had failed to rebut the presumption that the three-digit punitive-compensatory damages ratio was

unconstitutional because the defendant's actions were not sufficiently egregious to support such a significant disparity. *Id.*

Yaschik asserts that, instead of relying on out-of-state precedent, the Court should have applied the presumption against constitutionality established under *Atkinson* given the enormous disparity between nominal and punitive damages in this case. Although Yaschik relied on *Atkinson* in its appeal for the proposition that such a disparity was presumptively unconstitutional, the Court of Appeals failed to address the case, much less apply it. If *Atkinson* is applied, Top of the Bay cannot meet its burden of rebutting the presumption of unconstitutionality, especially considering that the Court of Appeals recognized that Yaschik's termination of the master lease resulted from "a desire to protect and advance its own interest" and that Top of the Bay failed to include any evidence in the record on appeal demonstrating reprehensibility.

CONCLUSION

For the reasons stated above, Yaschik respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

s/E. Brandon Gaskins

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July 1, 2021
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PROOF OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court's Amended Order regarding Operation of the Appellate Courts During the Coronavirus Emergency dated May 29, 2020, this is to certify that I have this day served counsel for the Respondent and the

Clerk of Court for the South Carolina Court of Appeals in the foregoing matter with a copy of the ***Petition for Writ of Certiorari*** via electronic mail only, addressed as follows:

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The Honorable Jenny Abbott Kitchings
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Clerk of Court, South Carolina Court of Appeals

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July 1, 2021

VIA EMAIL ONLY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211
Email: supctfilings@sccourts.org

Re: Sea Island Food Group, LLC d/b/a SQUEEZE v. Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, et al.
Case No.: 2013-CP-10-7107
Appellate Case No.: 2018-000906
MVA File No.: 029018.000023

Dear Mr. Shearouse:

Pursuant to Section (c)(6) of the Supreme Court's Amended Order regarding Operation of the Appellate Courts During the Coronavirus Emergency dated May 29, 2020 (the "Order"), please accept the enclosed **Petition for Writ of Certiorari** and **Proof of Service** for filing in the above matter. Further, pursuant to Section (e) of the Order, which suspends the requirement to file the Appendix under Rule 242, SCACR, the Appendix is not being submitted.

By copy of this letter, I am serving Respondent's attorneys and the Clerk of the South Carolina Court of Appeals with a copy of the Petition.

Thank you for your assistance with this matter. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

E. Brandon Gaskins

EBG/llp

Enclosures: As stated.

cc: **VIA EMAIL ONLY**
The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals
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July 1, 2021

VIA EMAIL ONLY
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Re: Sea Island Food Group, LLC d/b/a SQUEEZE v. Yaschik Development Company, Inc., d/b/a Yaschik Enterprises, et al.
Case No.: 2013-CP-10-7107
Appellate Case No.: 2018-000906
MVA File No.: 029018.000023

Dear Ms. Kitchings:

Pursuant to Section (c)(6) of the Supreme Court's Amended Order regarding Operation of the Appellate Courts During the Coronavirus Emergency dated May 29, 2020, please accept the enclosed **Petition for Writ of Certiorari** and **Proof of Service** for filing in the above matter. The Petition has also been filed with the South Carolina Supreme Court and served on counsel for the Respondent.

Thank you for your assistance with this matter. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

E. Brandon Gaskins

EBG/llp

Enclosures: As stated.

cc: **VIA EMAIL ONLY**
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