THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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, Inc. d/b/a Club Light ..... Fourth-Party Plaintiff, Respondent/Appellate

V.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE

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") in September 2013 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. 162-174). 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. 152-161). 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. 175-186)

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. (R. pp. 181--182) 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. (R, pp. 184-185).

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, l. 10 – p.73, l. 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, ll. 7-13).

The trial court denied Yaschik's motion for directed verdict on Top of the Bay's interference claim. (R. p. 70, ll. 14-23).

The jury then returned a verdict in favor of Top of the Bay on its interference claim against Yaschik.[1] (R. p. 123/R. p. 120). The jury awarded Top of the Bay $1.00 in nominal damages and $133,333.33 in punitive damages. (R. p. 123/R.p. 120).

On February 12, 2018, Yaschik moved for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, a new trial, or, in the alternative, a new trial nisi remittitur and motion for setoff. (R. p. 193-229). On May 7, 2018, the trial court issued its order on post-trial motions dnying 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 found that Yaschik interfered with the sublease and rendered FLP's performance impossible, justifying FLP's breach. It further found that the

[1]The jury also returned a verdict against Yaschik on Squeeze's claim for intentional interference with contractual relations and on FLP's breach of contract claim. (Verdict Form) Yaschik subsequently settled all claims with Squeeze and FLP.

question of Yaschik's justification was a question of fact for the jury to decide. (Id. at 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. 230-266). On June 1, 2018, Yaschik filed an amended notice of appeal. (R. pp. 267-270).

STATEMENT OF THE FACTS

The commercial real estate building at 213 East Bay Street, Charleston, South Carolina was a two-story structure that was home to four (4) businesses. On April 2, 2013 a fire significantly damaged the building, especially the upstairs rear portion. At the time of the fire, Yaschik owned the building. FLP was the master tenant. Top of the Bay occupied the entire upstairs with two (2) distinct clubs: Club Light and Speakeasy. (R. pp. 673-682).. Squeeze occupied a portion of the first floor. (R. p. 303, ll. 23-24). Both the master lease and the subleases contained substantially similar language, requiring the lessor(s) to return the space to its pre-casualty condition as soon as practicable, unless the property was totally destroyed. The subleases were concurrent expiring March 31, 2017. (R. p. 303, l. 19 and R. pp. 557-561).

FLP's agent, Michael J. Quillen, immediately undertook to file the casualty insurance claim, hire Belfor Engineering to commence securing the building and coordinated these efforts with Yaschik's agent, Tom Ervin. (R. p. 627-630).. Once the damaged elements were removed, an effort by FLP was undertaken to determine the cost of restoring the building. It became apparent over the next few months that the One Million and 00/100s ($1,000,000.00) Dollars insurance proceeds would be insufficient to restore the building. FLP and Yaschik began negotiating which would pay the difference to restore the building. (R. pp. 610-611, 632, 633).

Yaschik simultaneously secretly entered into negotiations with East Bay Company, Ltd. (EBCO) to sell the damaged building. (R. p. 599). When FLP refused to agree to pay the restoration shortfall, Yaschik sent an email and correspondence on September 11, 2013 stating the lease and subleases were terminated because the building was "totally destroyed". (R. p. 612). Contemporaneously, Tom Ervin, Yaschik's manager, visited the site for the very first time since the fire. (R. pp. 312-313). December 30, 2013 Yaschik enters into an agreement to sell 213 East Bay Street to EBCO for a base price of Five Million Four Hundred Forty Thousand and 00/100s ($5,440,000.00) Dollars, less the cost of repairs. (R. pp. 581-598 and R. pp. 324-330). This base price in the agreement is premised on the annualized April 1, 2013 rents derived from the subleases divided by a market cap rate of five (5) percent: total annual rents divided by .05. (R. pp. 581-598 and R. pp. 329-330).

At the time of the trial in January/February 2018 the building at 213 East Bay Street was still not ready for occupancy.

ARGUMENT

I. THE SUPREME COURT SHOULD **NOT** GRANT CERTIORARI AND SHOULD LEAVE UNDISTURBED THE COURT OF APPEALS DECISION THAT THE JURY FOUND THE DEFENDANT CAUSED THE BREACH OF CONTRACT BY THE MASTER TENANT.

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

1. Standard of Review

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt. *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). Moreover, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 300, 536 S.E.2d at 419.

2. The trial court ruled that FLP had a defense to Top of the Bay's Breach of Contract Claim, not that there was no breach. Consequently, the trial court correctly denied Yaschik's post trial motion as it related to Top of the Bay's Intentional Interference with Contractual Relations cause of action.

Yaschik correctly sets forth the five (5) elements for a cause of action for tortious interference with contract as held in *Vortex Sports & Elvin 't. Inc. v. Ware*, 378 S.C. 197, 205, 662 S.E. 2d 444,449 (Ct. App. 2008). Yaschik's argument that the Court ruled as a matter of a law that there was no breach of the subtenants' respective leases with FLP is simply inaccurate. The Court clearly ruled: (1) that Yaschik's notice of termination letter dated September 11, 2013 to FLP retroactively terminated the master lease and subleases back to the date of the fire, April 2, 2013; (2) that the subtenants' breach of contract claim against Yaschik failed for lack of "privity of contract" and "privity of estate"; and (3) that the subtenants' contractual claims against FLP were defeated, not by a failure to establish the elements of the breach of contract, but rather that FLP was excused from liability for the breach pursuant to its affirmative defense of "impossibility". Thus, the Court found an

underlying breach of the sublease, but excused FLP's failure to "restore the premises". The breach occurred because of Yaschik's conduct. The Court allowed the jury to determine if Yaschik's September 11th termination was proper or improper. The jury clearly found that retroactive termination was improper and intentional, as evidenced by the substantial compensatory and/or punitive awards reflected in the special verdict form. (R. pp. 119-123).

The trial court was very clear on how it ruled on this issue. In particular, the court stated, in its Order on Post -Trial Motions that:

> [w]ith regard to the third element, this Court did not rule that as a matter of law there was no breach of the sublease, but rather, it was found that there was a valid defense to the breach (namely, impossibility due to Yaschik's conduct). 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 sublease and rendered FLP's performance impossible — thereby justifying FLP's breach. This finding inherently entails that the subleases were indeed breached, and, therefore, the subtenants met this third element at trial. With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury. (R. pp. 7-8)
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> .

If one wants to determine how the trial court ruled on a particular issue, one would ask the trial court. Here, the trial court was so asked through the post-trial motions and the court answered unambiguously that it did not rule that there was no underlying breach by FLP. Therefore, Yaschik's argument fails.

Moreover, the trial court's ruling with regard to the defense of impossibility was in error. FLP took the position that it was entitled to judgment as a matter of law with regard to Top of the Bay's Breach of Contract claim against it because Yaschik's termination of the Master Lease made it impossible for FLP to perform. FLP moved for directed verdict against Top of the Bay

grounded upon that assertion. The trial court granted the motion and dismissed Top of the Bay's claims against FLP.

The doctrine of impossibility excuses performance when "the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) (citation omitted). [FLP] bore the burden of proving impossibility by the greater weight of the evidence. Id.

Early cases were uniform that once a party contracted to perform an act, their later failure to perform the act promised breached the contract, unless it expressly excused performance or allocated the risk of nonperformance elsewhere. This rule is traced to *Paradine v. Jane*, 62 Eng. Rep. 897 (K.B. 1647), and its limited exceptions, as developed in the United States, were described in *Dermott v. Jones*, 69 U.S. 1, 5-6 (1864):

> [I]f a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him... If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.

To account for this strict liability, parties began building excuses into their contracts, but these attempted safeguards proved as imperfect as human foresight. Over time, courts elsewhere began using the doctrine of impossibility of performance to fill gaps left when parties failed to foresee and allocate catastrophic risks. But as the Seventh Circuit notes, parties can still eschew these safeguards and agree to perform acts over which they have no control:

> [The doctrine of impossibility of performance] is just a gap filler—a guess at what the parties would have provided in their contract had they thought about the contingency that

> has arisen and has prevented performance or made it much more costly. As Holmes explained, "the consequences of a binding promise at common law are not affected by the degree of power which the promisor possesses over the promised event. . . . In the case of a binding promise that it shall rain to-morrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee.
>
> He does no more when he promises to deliver a bale of cotton." O.W. Holmes, Jr., *The Common Law* 299-300 (1881).

Wisconsin Elec. Power Co v. Union Pac. R Co., 557 F.3d 504, 506 (7th Cir. 2009) (internal citations omitted).

A leading South Carolina impossibility case involved a promise to deliver not cotton, but black-eyed peas. Not just any black-eyed peas, but "Texas New Crop U.S. 1 Black-eyed peas" grown in Dilley, Texas. Our supreme court held performance of the contract was made impossible due to an act of God when torrential rains wiped out the entire Dilley crop. Citing *Dermott*, the court held performance is excused when "rendered impossible by the act of God, the law, or the other party." *Pearce-Young-Angel Co. v. Charles R. Allen, Inc.*, 213 S.C. 578, 586, 50 S.E.2d 698, 701 (1948); *see also Ordinary of Charlestown Dist. v. Corbett & Lightwood* 1 S.C.L. 328, 323 (1793) (finding performance was made impossible by British invasion during American Revolution, reaffirming "the act of God, or of an enemy, were the highest excuses known in law for the non-performance of a contract") (Rutledge, C.J.).

Later South Carolina cases have reaffirmed, but not expanded, these limited grounds of impossibility. *See, e.g., Jones v. Bates*, 241 S.C. 189, 193, 127 S.E.2d 618, 619 (1962); *V.E. Amick & Assocs., LLC v. Palmetto Envtl. Grp., Inc.*, 394 S.C. 538, 546, 716 S.E.2d 295, 299 (Ct. App. 2011).

Finally, the Court of Appeals clarified South Carolina law as it related to the doctrine of impossibility in the recently published case of *Morin v. Innegrity, L.L.C.*, Opinion No. 5550 (Ct. App. 2018) It must be noted that the Innegrity decision was released on April 25, 2018 which was after the trial below concluded and after the trial court granted FLP's Motion to Dismiss Top of the Bay's contract claims. Again, Innegrity makes clear the South Carolina law in this regard and further makes clear that the trial court's dismissal of Top of the Bay's contract claim was in error.

Innegrity involved a contract within which Innegrity was required to remove Morin, who was an employee, as guarantor on any of Innegrity's loans in the event Innegrity fired him without cause. Innegrity subsequently fired Morin without cause but was unable to remove Morin as guarantor on two bank loans despite making efforts to do so. As a result, Morin brought an action seeking to recover on, among other things, a cause of action for breach of contract.

Innegrity attempted to establish its affirmative defense of impossibility by showing the company was insolvent at the time of Morin's termination and the banks had rejected its request to remove him as guarantor. In other words, Innegrity opined that, because the banks refused to allow the removal of Morin's guarantee, it was impossible for Innegrity to perform as required under the contract.

The Court of Appeals rejected Innegrity's impossibility defense and held that, when Innegrity undertook the obligation to remove Morin's name, even though it knew or should have known that such a removal depended on the lender's agreement, it assumed the risk of not being able to do so. The Innegrity Court stated that "[e]ven the most generous interpretation of impossibility will not save a contracting party who bargains for

his own folly by guaranteeing performance despite impracticability." Id. at pg. 6. The Court of Appeals held that Innegrity's affirmative defense of impossibility fails because it bore the risk of not being able to perform.

Here, as was the case in Innegrity, FLP entered into a contract in which it bound itself to do certain things that it knew or should have known could be made impossible by the actions of a third party, namely Yaschik. In particular, the sublease between FLP and Top of the Bay provided, among other things that "[i]f the premises are damaged but not wholly destroyed by fire or other casualty . . . Landlord shall restore the Premises to substantially the same condition as prior to damage as speedily as practicable." (R. pp. 618, ₱ 18). It was clear that FLP's ability to restore the building and continue with the sublease depended on Yaschik continuing with the Master Lease. FLP assumed the risk in its inability to perform if Yaschik failed to perform.

Again, FLP knew at the time it entered into the sublease with Top of the Bay that its ability to provide Top of the Bay with a sublease depended on Yaschik providing it with the master lease. Language making FLP's obligation to Top of the Bay contingent on Yaschik's performance pursuant to the master lease could have easily been added to the sublease. FLP chose not to add such language. Even the most generous interpretation of impossibility will not save a contracting party who bargains for his own folly by guaranteeing performance despite impracticability. This is the lesson of Holmes' rainmaker. *See supra, Farnsworth on Contracts*, § 9.6 at 643. *See also Restatement (Second) of Contracts* § 261 (1981), cmt. c. FLP's impossibility defense should have failed as a matter of law, as FLP bore the risk of not being able to perform.

Moreover, FLP had the burden of proof with regard to its claim of impossibility. "A party claiming impossibility of performance has the burden of proving the defense. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875, 879 (Ct.App. 1997). In particular, FLP has the burden of proving that its ability to perform its obligations under the contract is rendered impossible "by an act of God, the law or by a third party." See V. *E. Amick & Associates LLC v. Palmetto Environmental Group*, 394 S.C. 538, 716 S.E.2d 295 SCAP. 2011). A party to a contract cannot be excused from performance on the theory of impossibility of performance unless it is made to appear that the thing to be done cannot by any means be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed to in law impossible Hawkins at 879.

Here, it was not impossible for FLP to "restore the premises to substantially the same condition as prior to damage as speedily as possible" as required under the parties' lease agreement. In fact, FLP began the restoration process by obtaining necessary permits and hiring persons or entities to begin the work. Even after Yashick informed FLP that it was terminating the Master Lease, FLP continued the process of restoring the building. Finally, FLP had the financial means to complete the restoration. There has been no showing that restoration of the building by FLP could not by any means have been accomplished. Therefore, it was possible for FLP to restore the building as required under the sublease and the motion should have failed. Even if the court determined properly that FLP could not perform because of Yaschik's breach, FLP assumed the risk of the loss and the motion should have failed for that reason.

Even if Yaschik would have taken steps to stop or otherwise prevent FLP from performing its obligations, FLP had the ability to seek other avenues to allow it to perform

such as judicial recourse to request injunctive relief or specific performance. While such procedures may have been difficult, there is nothing to show that it would have been impossible.

As a result of FLP's inability to prove that it was impossible for it to perform, its Motion for Directed Verdict should have failed. Had that happened, Yaschik would not now claim that the trial court ruled as a matter of law that FLP did not breach the contract. What is for certain in reviewing the state of case presented for deliberation is the jury was nonetheless given the option of choosing the malefactor between Yaschik and FLP. This is harmless error as between Yaschik and TOTB. The matter was correctly determined by the jury at trial, and TOTB abandoned its cross-appeal.

II. THE SUPREME COURT SHOULD **NOT** GRANT CERTIORARI TO ADDRESS THE ISSUE 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 TERMINATIONOF ITS OWN CONTRACT WITH THE THIRD-PARTY IN PURSUIT OF THE DEFENDANT'S FINANCIAL INTEREST.

A. The Jury Determination that Yaschik Was Without Justification Is a Factual Determination, Subject to More than One Inference, so the Court Cannot Substitute Its Own Judgment for that of the Jury.

1. Yaschik Was Not Exercising an Absolute Legal Right in Good Faith.

The South Carolina cases cited by Yaschik - Gailliard v. Fleet Mortgage Corp.,880 F.Supp. 1085 (D.S.C.), Webb v. Elrod, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992),and *S. Contract., Inc. v. H.C. Brown Const.*, 317 S.C. 95, 450 S.E.2d 602 - all involve a party exercising in good faith an absolute legal right. Yaschik was not exercising an absolute legal right in good faith. While there is a provision within the Master Lease under which the building owner (Yaschik) had a legal right to terminate the Master Lease in the sole circumstance that the building was totally destroyed, that circumstance did not exist.

Yaschik had no legal right to terminate the Master Lease, and any purported termination would be exercised in bad faith, evidencing a lack of justification. Yaschik's reference to *S. Contract, Inc.* and the manner chosen to enforce rights is irrelevant. Yaschik itself recognizes that the legal principle is that a party is justified in exercising only a legal right under a contract when it does so in good faith. (R. p. 199). Yaschik did not have an absolute contractual right to terminate the Master Lease and was not acting in good faith. The jury expressly found that Yaschik did "breach the Master Lease by improperly terminating the lease on the basis that the premises were totally destroyed." (R. p. 122). Thus, Yaschik was not exercising any legal right or acting in the proper pursuit of its contractual rights when it purported to terminate the Master Lease - which is the conduct that interfered with the subleases.

2. Evidence Was Admitted Demonstrating that Yaschik Did Not Have a Good Faith Belief that the Premises Was Totally Destroyed.

Yaschik asserts that it truly believed the premises were totally destroyed, and it was justified in terminating the lease on that mistaken belief and/or misreading of the Master Lease. However, significant evidence was presented at trial that Yaschik did not truly believe the premises were totally destroyed - and even evidence that Yaschik did not believe it had effectively terminated the lease (seemingly in recognition of the fact that it did not have the right to do so). The jury could have inferred from that evidence that Yaschik was not acting in good faith and was acting without justification.

A. The Trident Construction Notice.

Namely, five years after the fire occurred, Yaschik's construction contractor filed a notarized, sworn statement with the City of Charleston that stated, first, that there was to ***be a "renovation of existing building." (R. pp. 714-715). It would stand to reason that if

there was an "existing building," the building could not have been totally destroyed. Furthermore, as Yaschik's experts repeated ad nauseam at trial, if the building was totally destroyed, rebuild —not a renovation—of the building would be required. This same notice also stated that "the second level of the building was damaged by fire in 2013." (R. pp. 714-715). This is a further representation that Yaschik and its employed contractors believed that the building was damaged only, that the damage was limited primarily to the second floor, and that Yaschik did not truly believe that the building was totally destroyed.

B. The Work Between the Fire and September.

Furthermore, evidence was presented that Yaschik's CEO himself did not view the building until five months after the fire occurred (R. pp. 312, l. 16-25), and that he allowed FLP and its contractors to work to restore the premises, under the determination that the building was not totally destroyed, and the leases were not terminated under Paragraph 20. (R. p. 8 and R. p. 555). Also, despite having purportedly terminated the Master Lease, Yaschik continued to engage in negotiations with FLP to purchase the Master Lease. Thomas Ervin also testified that Yaschik would have allowed FLP to continue paying for work on the building after the purported termination. Based on that evidence, a reasonable jury could have found that Yaschik knew the premises were not totally destroyed and did not believe it could actually terminate the Master Lease on that ground. So, despite Yaschik's arguments about "mistakenly concluding the building was totally destroyed and reliance on "debatable language" in the lease, there was evidence that neither of those things were true.

C. Photographs and Testimony of Witnesses

Evidence was also made available to the jury showing the state of the building after the fire. These photographs showed that the building was largely intact, and that the first floor had no or absolutely minimal fire damage. (R. pp. 638-704). The testimony of all witnesses except Thomas Ervin of Yaschik and Edward Porcher, Yaschik's hired expert—neither of whom viewed the building until five months to a year after the fire— testified unequivocally that the building was not totally destroyed.

D. Yaschik's Expert Testimony

Furthermore, Yaschik's own expert witness, Edward Porcher, testified that the first floor was "intact" after the fire. The balance of the evidence weighs so heavily against a finding that the building was totally destroyed that there can be no credible or valid belief that Yaschik could hold a good faith belief of total destruction. Yaschik's own expert testimony and sworn-agent's construction notice demonstrate that Yaschik did not truly believe in its assertion that the premises were totally destroyed by fire. Accordingly, the verdict should be upheld as there is evidence to sustain the factual findings implicit in the jury's verdict. Yaschik has failed to provide any compelling reason to justify invading the jury's province and overturning the verdict that Yaschik intentionally interfered in Plaintiff's contractual relations. There was evidence from which an inference could be drawn that Yaschik was not exercising a legal right in good faith. The jury clearly did not find Yaschik's arguments credible, and the Court cannot overturn that finding where multiple inferences could be drawn from the evidence.

3. Improper Purpose Is Not Required Under South Carolina Law.

Yaschik's next argument seems to be that it was not acting with improper purpose because it was acting to advance its own economic interests. While Plaintiff asserts that such conduct would be improper purpose under South Carolina case law, it is moot because improper purpose is not required for interference with an existing contract. While South Carolina does require an "improper purpose or improper methods" for intentional interference with prospective contractual relations, *Crandall Corp. v. Navistar Int'l Transp. Corp.,* 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990), this requirement has not been extended to interference with existing contracts. It would be peculiar for South Carolina to state the elements of the two causes of action separately, as in *S. Contract, Inc.*, and to nevertheless require the same elements of proof for both causes of action.

While a cause of action for intentional interference with prospective contractual relations requires "improper purpose," there is no such requirement for interference with an existing contract - which is the cause of action under which the jury found for Top of the Bay. This is logical because, with an existing contract, the parties have a greater definiteness and expectancy and a stronger claim for security, so the standard would be understandably less than that required of interference with a prospective contract. The right of subleasees to continue uninterrupted in a binding sublease, which was permissible and contemplated under the Master Lease, is superior to Yaschik's right to improperly breach a Master Lease for its own economic interests. In support of the dubious position that it should be otherwise, Yaschik cites cases interpreting Illinois law and Alaska law - but no South Carolina cases.

In support of its argument, Yaschik cites the Illinois case of *Bergfeld v. Stork*, 7 Ill.App. 3d 486, 488, 288 N.E.2d 15, 16 (Ill. Ct. App. 1972). In that case, the court expressly listed "[i]ntentional and malicious inducement of the breach" as an element of a claim for intentional interference with contractual relations in Illinois. *Id.* Again, this is not required for Top of the Bay's claim, so an Illinois court's analysis of whether defendant's conduct was committed with malice and intent to cause plaintiffs to lose their contract or maliciously induced the breach is irrelevant to this matter.

The case of *Toys "R" Us v. NBD Trust Co.*, 904 F.2d 1172, 1178 (7th Cir. 1990) is similarly distinguishable because the defendant there was "acting to protect a conflicting interest that is considered to be of equal value to or greater than [plaintiff's]contractual rights, and [defendant's] acts must have been legal acts not unreasonable under the circumstances." (internal quotations omitted)). Yaschik was not acting for any conflicting interest of equal value or greater than Plaintiff's contractual rights, its acts were not lawful (because it was found to be in breach), and there was evidence the actions were not reasonable under the same circumstances.

Similarly, Alaska apparently requires that the defendant's conduct "was not privileged or justified." *Bendix Corp. v. Adams*, 610 P.2d 24, 29 (AK 1980) (also holding that the burden of proving privilege or justification was on the defendant); *RAN Corp. Hudesman*, 823 P.2d 646, 648 (AK 1991). South Carolina has not adopted that language - or recognized any "privilege"; rather, the sole parameter under South Carolina law is that there was justification for the interference. Furthermore, the privilege in Alaska applies where the party inducing the breach has a direct financial interest in the contract to be breached. Section 769 of the Restatement (Second) of Torts, upon which this privilege is

based, makes clear in Comment C that the requisite financial interest for this privilege is an interest in the nature of the investment. For example, it applies where a parent company directs a subsidiary to breach a contract essentially because the parent company is exposed to the risk of personal loss because of the subsidiary's breach. This would appear to be an extension of the idea that a party cannot induce breach of a contract to which it is a party. Yaschik did not have a direct financial interest in FLP so even if South Carolina were to recognize this privilege, it would not be applicable. The record was replete with evidence that Yaschik was acting with an improper purpose, but even if it weren't, Plaintiff is not required to show improper purpose for a claim for intentional interference with an existing contract in South Carolina - despite Yaschik's attempt to rely on unrelated law from other jurisdictions.

Top of the Bay also relies upon the trial court's reasoning in denying Yaschik's post-trial motions grounded upon the claimed justification. The trial court reasoned as follows:

> With regard to the fourth element, the question of whether Yaschik acted without justification was a factual determination to be made by the jury.
>
> At trial, photographs of the building were shown to the jury showing portions of the premises largely intact. Also, evidence was presented showing that Thomas Ervin did not visit the building during the five months following the fire when FLP was making substantial efforts and rehabilitating the premises. Moreover, expert testimony at trial indicated that the building could have been restored to substantially the same condition. 'there was sufficient evidence presented at trial for a jury to reasonably conclude that Yaschik acted in bad faith by declaring the premises totally destroyed. The jury here could have reasonably, and based upon the evidence at trial, ultimately did find, that Yaschik knew of the valid and existing subleases, that Yaschik intentionally procured FLP's breach of the subleases by terminating the

> Master Lease on the basis of "total destruction," and that subtenants suffered damage as a result thereof. As such, Yaschik's Motion for JNOV is denied. (R. p. 8).

III. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI TO ADDRESS THE QUESTION OF WHETHER THE RATIO TEST FOR REVIEWING THE CONSTITUTIONALITY OF A PUNITIVE DAMAGES AWARD APPLIES WHEN THE JURY AWARDS ONLY NOMINAL ACTUAL DAMAGES

A. The jury's punitive damages award was proper and in accord with the law

1. The Evidence Presented Demonstrated that Yaschik's Conduct was Willful, Wanton and in Reckless Disregard of Top of the Bay's Rights.

Next Yaschik claims that the punitive damages award was improper and contrary to law. Yaschik's first contention in this regard is that the subtenants failed to present clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of their interests. The test used to make this determination is whether the tort was "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. v. Bank of Am., N. A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was sufficient evidence presented at trial upon which the jury could have, and did indeed, determine that Mr. Ervin acted in such a way that he was conscious that his behavior would interfere with the subtenants rights under the contract. Indeed, the evidence showed that he conducted negotiations- unbeknownst to and to the detriment of the subtenants- with EBCO and Mr. Hilton Smith to sell 213 East Bay Street. This first factor is heavily in favor of allowing the punitive damages awarded to the subtenants to stand.

Here, the evidence at trial demonstrated that Torn Ervin, Yaschik's representative, was aware that the Plaintiff was a subtenant under the Master Lease and wanted to terminate the subleases of the building. He testified that he walked by the building several times a week and drove by it twice a day. An email from Tom Ervin to FLP was admitted demonstrating that Tom Ervin even had a copy of Plaintiff's insurance policy. Accordingly, Yaschik was aware that Plaintiff was a subtenant in the building, and that his action of purporting to terminate the Master Lease would damage Plaintiff. Furthermore, as recounted above in Section l(B)(ii), evidence was presented that Torn Ervin could not have credibly believed that the building was totally destroyed. There was also evidence that Yaschik had motivation to cause the breach of the subleases, because it hoped to sell the building free and clear of any subleases. All of this shows by clear and convincing evidence that Yaschik's conduct was willful, wanton, or in reckless disregard of Plaintiff's rights.

2. The Jury's Punitive Damages Award was not a Due Process Violation

Yaschik argues that Top of the Bay's award of punitive damages violates its due process rights. In particular, Yaschik argues that "the jury's award was unreasonable and not consistent with due process." The Supreme Court has held that punitive damages can be imposed to further "legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). The High Court has "instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the

defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and 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.* at 418, 123 S.Ct. 1513. A review of the facts of this case makes it clear that the award of punitive damages was neither grossly excessive nor arbitrary.

First, with regard to the first prong of the analysis, the United State Supreme Court has directed that lower courts should determine the degree of reprehensibility in light of whether:

> [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Saunders v. Branch Banking and Trust Co. Of Va., 526 F.3d 142 (4th Cir., 2008); (*citing *State Farm,* 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore,* 517 U.S. at 576-77, 116 S.Ct. 1589)).

Here, evidence was provided from which the jury could have, and obviously did, find that Yaschik actions in leading the subtenants to believe that Yaschik intended to restore the building to the state it was in prior to the fire, when Yaschik never so intended. That and other evidence evinced an indifference to or a reckless disregard to the rights and well-being of the subtenants. Kelly Tant testified that her sole source of income was derived from Club Light and Speakeasy. She further testified that she used that income to support herself and her daughter. She was clearly financially vulnerable. Every day that Yaschik continued the charade was another incident of reprehensible conduct. In other

words, the conduct involved repeated actions. Finally, in surreptitiously making plans with East Bay Company to oust the tenant and subtenants so that East Bay could buy the building, Yaschik was acting intentionally, with trickery and deceit. Yaschik's actions were reprehensible to a great degree.

Yaschik seems to rely upon its claim that Top of the Bay's damages were economic in nature to show a low degree of reprehensibility. One does not have to meet all of the criteria set forth in the reprehensibility prong to prevail on the issue. In *Saunders v. Branch Banking and Trust Co. of Va.*, 526 F.3d 142 (4th Cir. 2008) the Plaintiff therein brought an action alleging that Branch Banking & Trust Company of Virginia (BB & T) violated its duties as a furnisher of information under the Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681-1681x (West 1998 & Supp.2007) (FCRA). After a full trial, the jury returned a verdict for Saunders, awarding him $1,000 in statutory damages and $80,000 in punitive damages. BB & T subsequently appealed, challenging the district court's denial of its motions for judgment as a matter of law and for remittitur. In that case, the damages claimed by the Plaintiff were purely economic. In evaluating the issue of reprehensibility, the trial court and appellant court determined that the Defendant's actions were intentional and repeated so an award of punitive damages was appropriate. Again, it is clear that Yaschik's actions were likewise intentional and repeated as well as done with deceit and trickery. The first prong of the analysis supports the jury's award of punitive damages to Top of the Bay.

The second guidepost in reviewing a punitive damage award takes a look at the disparity, if any, between actual or potential harm and the punitive damages award. To make this determination, a court may consider: (1) the likelihood the award will deter

future like conduct; (2) whether the award is reasonably related to the harm likely to result from such conduct; and (3) the defendant's ability to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d. 176 (S.C. 2009). Examining the factors, it is reasonable to think that the award of punitive damages will deter Mr. Ervin from future like conduct, the award is directly related to the harm resulting from his conduct, and Yaschik easily has the ability to pay.

Next and as for the comparability of the punitive damages award to the civil penalties authorized or imposed in comparable cases. There are no civil penalties applicable to this case.

As for Yaschik's claim that the ratio of punitive damages to actual damages is excessive, the ratio analysis is inapplicable to this case. Here, Top of the Bay was awarded nominal damages of $1.00 and punitive damages of $133,333.33. There was no substantial award of actual damages to Top of the Bay. "Nominal damages are not intended to compensate a plaintiff for injuries, nor to act as a measure of the severity of a defendant's wrongful conduct." *Arizona v. Asarco* LLC, 773 F.3d 1050 (9th Cir. 2014)(Citing *Cummings v. Connell*, 402 F.3d 936, 945 (9th Cir.2005)). Because nominal damages measure neither damage nor severity of conduct, it is not appropriate to examine the ratio of a nominal damages award to a punitive damages award. *Saunders v. Branch Banking Trust Co. of Va.*, 526 F .3d 142, 154 (4th Cir.2008) (noting that "when a jury only awards nominal damages ... a punitive damages award may exceed the normal single digit ratio because a smaller amount would utterly fail to serve the traditional purposes" of punitive damages awards and stating that, in this case, the court would "not rely upon the challenged ratio." *Williams v. Kaufman Cnty.*, 352 F.3(1 994, 1016 Sr n. 76 (5th Cir.2003)

(stating that "any punitive damages-to- compensatory damages 'ratio analysis' cannot be applied effectively in cases where only nominal damages have been awarded"); *Romanski v. Detroit Entin't, LLC*, 428 F.3(1 629, 645 (6th Cir.2005) (noting that in a § 1983 unlawful arrest case, the "plaintiff's economic injury was so minimal as to be essentially nominal" and that in such a case, the Supreme Court's precedent "on the ratio component of the excessiveness inquiry—which involved substantial compensatory damages awards for economic and measurable noneconomic harm—are therefore of limited relevance") The "ratio test" is inapplicable here and cannot be used to challenge that jury's award of punitive damages to Top of the Bay.

Finally and with regard to the third prong of the analysis, it is agreed that there are "no authorized civil penalties applicable to this situation." Beyond that, Yaschik only cites four (4) cases in South Carolina and specifically refers only to the ratios of punitive to actual damages awards in those cases. As set forth hereinabove, the ratio test in inapplicable to the case at bar.

Clearly, there was sufficient evidence presented from which one could determine that Yaschik's actions were sufficiently reprehensible to support the jury's punitive damages award. As a result, Yaschik's motions for a new trial, and in the alternative, for reduction in the award should be denied.

Finally, the Honorable South Carolina Court of Appeals conducted a *de novo* review of the factors as required by South Carolina and Fourth Circuit precedent.

CONCLUSION

For the reasons set forth above, Top of the Bay requests that this Honorable Court leave undisturbed the decisions of the Honorable South Carolina Court of Appeals.

Respectfully Submitted,

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