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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

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

v.

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

BRIEF OF APPELLANT

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II. Did the trial court err in construing Section 6.01 of the Parking License Agreement as a liquidated damages provision?

III. Did the trial court err in its construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement?

IV. Did the trial court err in failing to address and accept the argument that Section 6.01 of the Parking License Agreement, if a liquidated damages provision, constitutes an unenforceable penalty?

V. Did the trial court abuse its discretion in denying the Town's motion to compel seeking financial records related to the operation of the parking garage which were discoverable under Rule 26(b)(1), SCRCP?

STATEMENT OF THE CASE

This is a breach of contract action. The Respondent Shem Creek Development Group, LLC ("SCDG") brought an action against the Appellant Town of Mount Pleasant ("Town") alleging state law claims for breach of contract and quantum meruit/unjust enrichment.[1] The contract claim focused on a Parking License Agreement ("PLA") that was entered between SCDG and the Town on October 17, 2013. (R. 1200-1213). The PLA involved a project "consisting of a multi-level structured parking garage, comprised of 276 total parking spaces, and a proposed office complex" to be built on Coleman Boulevard in the Shem Creek area of Mount Pleasant. (R. 1201). The license agreement involved 132 of the 276 total parking spaces. (R. 1201).

On June 23, 2016, before the project was built, SCDG terminated the PLA and sued for breach of contract. (R. 1429-1430). SCDG alleged that the Town was in breach of the PLA by anticipatorily refusing to pay the first year's rent into escrow, by refusing to provide an estoppel certificate, and by violating the implied covenant of good faith and fair dealing by taking actions to interfere with SCDG's performance under the agreement. SCDG alleged, among others, that the Town Council improperly enacted amendments to the zoning ordinances and refused to agree to an amendment of the PLA after SCDG realized that it could not provide the promised number of parking spaces. (R. 98-112).

After discovery, the case was tried non-jury by Circuit Court Judge Maite Murphy from February 3-6, 2020. On July 13, 2020, Judge Murphy issued a Final Order entering judgment in favor of SCDG on the breach of contract action in the amount of $2,604,316.00. (R. 27-72). The Town filed post-trial motions, including a motion for new trial absolute and a motion

[1] The quantum meruit/unjust enrichment was not pursued at trial. (R. 46).

reconsider, alter or amend under Rule 52(b). (R. 470-487). Those motions were denied by order filed on September 17, 2020. (R. 73-87).

The Town filed a timely Notice of Appeal on October 16, 2020. Subsequent thereto, on January 11, 2021, Judge Murphy issued an order awarding attorney's fees and costs in the amount of 298,965.22. (R. 88-97). The Town thereafter filed an Amended Notice of Appeal.

STATEMENT OF FACTS

In 2008, the Town of Mount Pleasant adopted a plan to revitalize the Coleman Boulevard corridor. In that plan, the Town identified the corner of Mill Street and Coleman Boulevard as a potential site for a parking garage. (R. 1161-1163).

In 2012, SCDG developed a concept for constructing a parking garage with a business office component in the Shem Creek area of Mount Pleasant. SCDG's members, Tyler Flesch and Robert Small, approached the Town about this concept. (R. 801, 807-808). In December 2012, SCDG engaged an architect, Ken Betsch, to develop conceptual schemes for various designs of the project. (R. 801, 807-808). Betsch prepared three separate and distinct design schemes with zero lot lines and no consideration of setback requirements. (R. 722). Scheme Two proposed two floors of office space sitting atop two floors of parking consisting of 276 total spaces measuring nine feet in width. (R. 833-834). Scheme Three provided three levels of parking garage, exceeding 276 parking spaces, and the same two-floor office building. Scheme Three accommodated approximately 310 parking spaces without diminishing any office space. SCDG opted for Scheme Two, because, in part it provided better water views for the tenants of the office space. (R. 807-808, 832). Betsch never performed any analysis of the Town's zoning regulations or made any assumptions about the regulations before preparing the conceptual sketches.

Parking License Agreement

SCDG used the conceptual renderings of Scheme Two to negotiate an exclusive Parking License Agreement ("PLA") with the Town. (R. 808, 810, 833). Neither SCDG nor its

representatives met with Town staff prior to and post negotiation to discuss the feasibility of Scheme Two. (R. 835).

Discussions between SCDG and the Town culminated in the adoption by Town Council of a resolution on October 8, 2013, approving the Town's entry into the PLA to license 276 parking spaces in the parking garage. (R. 871, 1185-1213, 1326).

The PLA includes the following material terms:

* The Project would consist of a multi-level structured parking garage, comprised of 276 total parking spaces;

* The Town would pay rent to reserve 132 of those 276 total spaces for public parking on weekdays from 6 AM to 5 PM;

* The remaining 144 spaces would be reserved for the public after 5 PM on weekdays and all weekends;

* The license term was 30 years;

* The Town would pay to SCDG annual rent of $185,000 for a period of 15 years;

* SCDG's rights under the PLA were contingent upon all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity;

* The Town would be entitled to a rent reduction should the operation results in a net operating profit;

* Construction of the project was contingent upon all necessary approvals for construction being issued by the appropriate Town of Mount Pleasant department or entity;

* SCDG, in its sole and absolute discretion, could elect to terminate the License Agreement at any time prior to the earlier of (i) 24 months from the Effective Date, or (ii) Licensor's commencement of construction of the Parking Garage; and

* The Town would be entitled to a rent reduction based on the profitability of the Garage; and

* The Premises shall include only the public spaces and necessary appurtenances specifically granted in this License, and shall not include any adjacent buildings, docks, or surface parking areas.

(R. 1200-1213).

The number of parking spaces within the parking garage was a material term of the PLA, as it was commensurate with the amount paid by the Town through its accommodations tax. (R. 902-903). Only a single page conceptual rendering of the exterior facade, showing no design details or assumptions, was attached as Exhibit A to the PLA. (R. 1212).

Jeff Johnston was retained by SCDG to replace Betsch in October 2013. (R. 1043, 1084). Johnston was tasked with preparing plans to meet the PLA minimum requirements, including 276 parking spaces within the footprint. (R. 1086). Johnston testified that SCDG was concerned by the fact that its initial design could not satisfy the number of spaces required by the PLA. (R. 1090-1091, 1093). Johnston also immediately assessed that the initial concept prepared by Betsch and attached to the PLA did not comply with the Town's existing zoning setback, activity zone, and parking space width requirements.

December 2013 Zoning Ordinance Amendments

On July 23, 2013, during the same time the parties were negotiating the terms of the PLA, SCDG requested that the Town enact multiple amendments to the Town's zoning code that would provide more favorable conditions for developing and constructing the parking garage, including an increase in the permissible building height, the elimination of flood proofing requirements, and ground floor commercial space in parking garages. (R. 1423, 1477).

The Town considered commercial space on the ground floor of the parking garage an essential element to meet the goals of the Coleman Overlay District, as it enhanced a pedestrian oriented environment, and ensured vibrancy in lieu of dead space that often accompanied parking

garages. (R. 991-993). In order to obtain removal of commercial on the ground level, Robert Small assured the Town of their intent "to work with staff to provide open spaces and people oriented design details to ensure the integrity of the activity zones on our adjoining streets." (R. 1423, 1477). Small did not request to amend or seek a variance from the nine feet width requirement for parking spaces. (R. 1002-1004, 1034). At all times relevant hereto, Town regulations required all commercial parking spaces to be nine feet wide. (R. 1033-1034).

In December 2013, the Town Council enacted Ordinance 13077 which incorporated all of SCDG's desired amendments. (R. 1007, 1424-1428). As part of these zoning amendments and commensurate with Small's stated intent, Ordinance 13077 required that garages which do not have floodproofing or first floor commercial "must provide added features such as public art, a fountain, a bus stop, similar feature(s) to promote and maintain pedestrian activity" on the "Boulevard side and side street sides" of the Garage. (R. 1427). This was a new requirement for garages, similar in purpose, but distinct from what was historically known as an "activity zone." (R. 994-996).

April 2014 Zoning Ordinance Amendments to the Overlay District

At the same December 2013 meeting, the Town Council approved the zoning amendments for SCDG's project, the Town Council also approved a review of the zoning regulations, including setbacks, governing the Coleman-Ben Sawyer Boulevards urban corridor zoning district that included the subject site. (R. 1356-1360). This review was a response to residents' complaints primarily about a residential development called Earl's Court, which was not far from SCDG's project site. (R. 1009-1011).

This request resulted in several specially called and publicly noticed meetings to discuss prospective amendments throughout the zoning district, including eliminating the possibility of

five-foot setbacks. (R. 1011-1013). These meetings culminated with comprehensive amendments to the Urban Corridor Overlay District, which Town Council enacted as Ordinance 14022 on April 8, 2014. (R. 1031, 1431-1471). These amendments satisfied all public notice requirements. (R. 1014-1020). The amendments contained in Ordinance 14022 were also addressed at length with public comment at the Ordinance's first reading.

One of the zoning amendments in Ordinance 14022 affected Simmons Street and Mill Street, thereby impacting multiple properties on both sides of Coleman Boulevard, due to anticipated pedestrian activity. This amendment changed a 20-foot setback requirement to a 20-30 foot build-to-line. (R. 1025-1026, 1470). This change to Mill Street from a 20-foot setback to a 20-30 foot build-to-line served to enhance and promote pedestrian activity along side streets as requested by SCDG during the amendments to Ordinance 13077. (R. 995-996). Ordinance 14022 also eliminated five-foot setbacks on side streets throughout the entire Urban Corridor Overlay District, including this project site. (R. 1021-1022).

SCDG Elected not to Provide the 276 Parking Spaces Required by the PLA

Prior to and during this time, SCDG had not submitted any site-specific development plan that could confer vested rights and protect the parking garage site from these zoning amendments. (R. 1027-1028). While the Town was publicly reviewing potential changes to the Urban Corridor Overlay District, Johnston was designing the project with a five-foot setback on the side fronting Mill Street without any regard for Robert Small's earlier representations to the Town regarding activity zones, the status of the law, or communication with staff. The Town staff learned during its first formal meeting with Johnston on April 11, 2014, that SCDG's design plans were not compliant with the zoning amendments in Ordinance 14022. (R. 1001, 1473-1475). Johnston admitted a reduction of only 18 parking spaces resulted from the April 2014

zoning amendments. (R. 1094-1095). Therefore, even assuming SCDG was able to build the parking garage with the setbacks it desired, the most parking spaces at the legal width its final architect was able to design totaled 252. (R. 1094-1095, 1098). SCDG thus offered the Town 234 spaces – 42 fewer parking spaces than it promised in the PLA. (R. 648). This represents more than 15% fewer spaces than SCDG contracted to provide. (R. 927).

Rather than alter its own plan to accommodate the agreed upon number of spaces, SCDG offered to amend the PLA to reflect their intended design and reduce the rental rate for the Town. The Town Council considered the offer and declined during a public meeting. SCDG then terminated the PLA by letter dated June 23, 2016, and proceeded to build the parking garage on its own. (R. 1429-1430). The parking garage was completed, and the certificate of occupancy was issued on July 28, 2017. (R. 1472).

STANDARD OF REVIEW

The standard of review for an action at law on appeal of a case tried without a jury requires the appellate court to not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976).

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

The standard of review for discovery matters is an abuse of discretion standard. *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826, 836 (1997).

ARGUMENTS

I. The trial court erred in awarding liquidated damages of $2,604,316 constituting fifteen years of rent payments when the Parking License Agreement provides that the "sole and exclusive remedy" is the rent payments due at the time of the termination of the agreement.

The trial court found the Appellant Town of Mount Pleasant breached the Parking License Agreement ("PLA") and awarded damages of $2,604,316, which represents the amount of unpaid rent over the initial fifteen years of the "License Term" reduced to present value. (R. 66). Section 1.07 of the PLA, which is captioned "Rent," provides that the Town agreed to pay $185,000 in annual rent, subject to "adjustments" based upon the financial performance of the parking garage. (R. 1201-1202). The payment of the rent in the amount of $185,000 for the first "License Year" was required to be paid into escrow upon the commencement of construction by the Respondent Shem Creek Development Group ("SCDG"), with the payment being released from escrow on the "Rent Commencement Date," that being the date of the issuance of the certificate of occupancy by the Town. (R. 1201-1202).

The parking garage was completed, and the certificate of occupancy was issued on July 28, 2017. (R. 1472). That was the date that the first rent payment was due. However, SCDG had terminated the PLA on June 23, 2016, more than a year prior to the issuance of the certificate of occupancy. (R. 1429-1430). As a result, neither the "Rent Commencement Date" nor the "License Term" had even started when SCDG terminated the agreement. Thus, no rent was due and payable when the PLA was terminated.

Nonetheless, the trial court ruled that SCDG was entitled to damages in the amount of the rent for the initial fifteen years of the "License Term" reduced to present value. (R. 66). The

trial court reached that conclusion by misinterpreting and misapplying two provisions of the PLA, specifically Section 6.01 and Section 8.17.

A. The trial court erred in construing Section 6.01 of the Parking License Agreement as a liquidated damages provision.

The trial court refers to Section 6.01 of the PLA as "a default clause that liquidates damages." (R. 33). However, as the Town argued, Section 6.01 is not a liquidated damages provision. Section 6.01 states in pertinent part as follows:

> In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that it [sic] *sole and exclusive remedy shall be the Rent Payments due under this Agreement*. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the cost of trial and any appeals.

(R. 1205). (Emphasis added). This is not a liquidated damages clause that establishes a sum certain as damages in the event of a breach. *See, Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC,* 408 S.C. 87, 757 S.E.2d 557, 559 (Ct. App. 2014) ("[c]laim for ... damages is 'liquidated' in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law"). Contrary to the trial court's ruling, this is a limitation of liability clause but not a liquidated damages provision.[2] Importantly, Section 6.01 does not provide for a sum certain, as is typical of a liquidated damages provision, nor does Section 6.01 provide for the ascertainment of damages by mathematical calculation. In order for damages to be ascertained for a breach, the factfinder

[2] The South Carolina appellate courts have upheld limitation of liability clauses in various contexts. *See e.g., Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013); *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016).

would need a factual basis for determining the rental payments due at the time of the breach as well as the "adjustments" to the Fixed Minimum Rent based on the financial performance of the parking garage. (R. 1202) A determination of those "adjustments" also requires a factual basis that may be subject to disputed evidence and thus would not be capable of determination as a sum certain.

B. The trial court erred in its construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement.

As indicated, Section 6.01 provides, in pertinent part, that the "sole and exclusive remedy shall be the Rent Payments due under this Agreement." (R. 1205). This language makes clear that the sole and exclusive remedy, in the event of a default, are the rent payments that are *due* under the PLA. As the Supreme Court has recognized, "[t]he word 'due' means 'owed or owing as a debt.'" *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). Thus, the exclusive remedy under Section 6.01 is the rent payments already incurred and owed *at the time of the termination of the contract*. However, when the PLA was terminated by SCDG on June 23, 2016, no rent had been incurred, and none was owed by the Town to SCDG. Hence, SCDG failed to prove its entitlement to any damages, and accordingly, judgment should have been entered in the Town's favor.[3]

Yet, the trial court improperly found that rent payments that would have come due in the future, if not for the termination, are included in the remedy available under Section 6.01 by reference to Section 8.17, which is captioned "Survival of Obligations" and reads: "The

[3] As the trial court ruled, damages are a necessary element of a breach of contract action. (R. 48). "The elements for breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little,* 426 S.C. 423, 827 S.E.2d 207, 210 (Ct. App. 2019). Consequently, the failure to prove recoverable damages is fatal to SCDG's claim.

provisions of this License with respect to any *obligation* of Licensee to pay any *sum owing* or to perform any act after expiration or other termination of this License shall survive the expiration or other termination of this License." (R. 1209). (Emphasis added). The trial court refers to Section 8.17 as the "survival clause." (R. 66). The trial court read Sections 6.01 and 8.17 together, and concluded that "the two provisions evidence the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement." (R. 67). In its interpretation of Section 8.17, the trial court committed several errors of law that warrant the reversal of the judgment against the Town.

First, the trial court disregarded the legal definition of "sum owing." That term, as the Supreme Court explained in *Mathis, supra*, means the same as "sum due," which is the amount owed *at the time of termination* and does not include future, non-incurred indebtedness.

Second, the trial court misunderstood the meaning of the term "obligations." In *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), the Supreme Court, in interpreting a section of the Nonprofit Corporation Act, recognized that there are "two categories of debt," namely "obligations incurred before resignation" and "commitments made before resignation." 821 S.E.2d at 673. The same is true in the context of a contract termination: there are obligations incurred before termination and commitments made before termination. The "obligations" are debts already incurred and thus due or owing, while "commitments" are debts that will come due in the future after the termination. Section 8.17 does not address the latter category of debt. The section is captioned "Survival of Obligations." The language refers only to "any obligation of Licensee to pay any sum owing." (R. 1209). There is no mention of "commitments made" nor to indebtedness for future payments not already

incurred, due, and owing. Hence, the trial court erred in construing Section 8.17 to require the Town to make future payments that were not due and owing at the time the PLA was terminated.

Third, the trial court erred in construing Section 8.17 as an acceleration clause. Tyler Flesch of SCDG testified that an original draft of the PLA included a rent acceleration clause in Section 6.01; however, during negotiations, the rent acceleration clause was stricken from the agreement which was readily agreed to by SCDG. (R. 705, 784-785). Thus, the parties agreed that the PLA would not include a rent acceleration clause which would make all rent payments due and payable upon a breach occurring. Yet, the trial court construed Sections 6.01 and 8.17 as creating just that -- a rent acceleration provision that is clearly inconsistent with the parties' stated intentions and inconsistent with SCDG's claim for immediate payment of all fifteen years of rent payments.

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

Moreover, "[t]he purpose of all rules of construction is to ascertain the intention of the parties to the contract." *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205, 209 (Ct. App. 2012). In *Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002), the Supreme Court held that "[b]asic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect.

It is not the function of the court to rewrite contracts for parties." 568 S.E.2d at 363.

Yet, with its erroneous construction and misapplication of Sections 6.01 and 8.17, the trial court has done just that -- rewritten the contract to provide SCDG with a substantial remedy in excess of $2.6 million where the contract terms actually provide for no remedy under the circumstances presented. The trial court has effectively written into the contract a rent acceleration clause that the parties deliberately through careful negotiation chose to exclude. That represents a clear error of law that warrants a reversal of the judgment entered.

In ruling that SCDG is entitled to recover the rents due during the initial fifteen years of the PLA, the trial court cites only a single case which is inapposite. The court cites to *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), wherein this Court interpreted contractual language that is very different from the "Rent Payments due under this Agreement" language in Section 6.01 of the PLA. In *Bluffton*, the default provision allowed the commercial lessor to recover "all costs, damages, and expenses (including reasonable attorney's fees and expenses) suffered by [lessor] by reason of Tenant's defaults." This Court ruled that "damages" was an undefined term in the lease which "undoubtedly includes the rent [lessor] was unable to recover during the remainder of the subject lease term due to Tenant's default." 772 S.E.2d at 891.

Of significance, *Bluffton* does not support the trial court's award in the present case in two distinct ways. First, as mentioned, the operative language is entirely different. The PLA did not allow for SCDG to recover all "damages." In fact, Section 6.01 provides that "[b]oth parties waive any claims that either may have to any consequential or punitive damages." (R. 1205). Instead, the "sole and exclusive remedy" is limited to "Rent Payments due under this Agreement." (R. 1205). The use of the term "due," as discussed above, does not show an intent

to include future payments not yet due; that language shows the opposite -- that only rent payments already incurred, due, and owing may be recovered. Second, this Court in *Bluffton*, contrary to the trial court's analysis here, *did not allow* the lessor to recover the full measure of the future rent payments as damages. Instead, this Court ruled that the lessor "was entitled to damages measured by the amount [lessor] would have received as rent for the remainder of Tenant's term had there been no default, *less the amount of rent [lessor] received from the two subsequent tenants it acquired in an effort to mitigate damages*." *Bluffton*, 772 S.E.2d at 890. (Emphasis added). In the present case, the trial court made no deduction for rents, revenue, or parking fees that SCDG (or its joint venturer) would be able to recover over the fifteen year term for the rental or use of the parking spaces at issue.

In fact, this error was initially precipitated by the trial court's denial of the Town's motion to compel by order filed January 22, 2020. The Town sought documents in discovery relating to the financial performance and operation of the parking garage, including documents sought by subpoena from 101 Coleman Partners, the joint venturer, with which SCDG constructed and operates the parking garage. Allegedly SCDG has a fifteen percent interest in 101 Coleman Partners.[4] Thus, the trial court erroneously denied the Town the opportunity to conduct discovery in order to establish the proper measure of damages discussed by this Court in *Bluffton*. The Town was denied critical discovery that would have permitted evidence to be presented at trial to demonstrate that SCDG and its joint venturer had recovered substantial income from the rental or use of the parking spaces that should have been deducted from the

[4] In its order, the trial court made findings of fact that "SCDG partnered with an equity investor to create a joint venture to own, build, and operate the office building and parking garage. Under the terms of the joint venture, SCDG relinquished its sole ownership of the project and retained only a 15% membership interest in the new venture." (R. 44). There is, however, no evidence in the trial record to support these facts.

total award. In sum, the trial court foreclosed the ability for the Town to address the measure of damages addressed in *Bluffton* by denying discovery on the issue, which is an abuse of discretion.

Moreover, even if the trial court's interpretation of Section 6.01 and 8.17 is correct, there is still no rent acceleration clause in the PLA. Instead, as cited above, the trial testimony from Tyler Flesch establishes that a rent acceleration clause was stricken from an earlier draft of the PLA by agreement. Flesch confirmed in testimony that the PLA does not provide for rent acceleration. (R. 705, 784-785). Yet, in awarding, as a lump sum, fifteen years of rent at $185,000 per year, the trial court provided for rent acceleration that is not part of the contract and was not the intent of the parties. Instead, assuming SCDG is entitled to future rent payments under Rule 6.01, which is nonetheless inconsistent with the term "due" as construed by the Supreme Court in *Mathis, supra*, the proper remedy would be an order requiring the Town to make the future rent payments as they come due. In addition, the calculation of the annual rent payment should be subject to the entirety of Section 1.07, including the rent reduction provision that allowed for "adjustments" based on the financial performance of the parking garage. (R. 1201-1202). The trial court erred in reading the allowance for such "adjustments" when calculating the Fixed Minimum Rent out of the contract. Section 1.07 sets the Fixed Minimum Rent at $185,000 per "License Year" and that rent is "subject only to the adjustments set forth herein." (R. 1201). Those "adjustments" are a part of the calculation of the yearly rental payment, and contrary to the trial court's determination were not extinguished upon the termination of the PLA by SCDG. To the contrary, assuming the trial court's analysis of Section 8.17 correctly applies to future rent payments (which the Town denies in the analysis above), the Town's future obligations included "to pay rent." (R. 23). The calculation of "rent" is

determined by Section 1.07 *in its entirety*. The trial court erred in selectively cherry-picking the provisions of Section 1.07 that apply beyond termination. If Section 8.17 includes a future "obligation" by the Town to pay rent, as the trial court has concluded, then that rent must be calculated to include the "adjustments" to which the parties agreed, including the provisions in Section 1.07(b).

In sum, the trial court committed multiple errors of law in its construction of Sections 6.01 and 8.17 of the PLA, resulting in clear error that warrants the reversal of the judgment entered against the Town and the entry of judgment in favor of the Town.[5] Alternatively, these errors require a new trial absolute at the very least.

II. The trial court erred in failing to address and accept the argument that Section 6.01 of the Parking License Agreement, if a liquidated damages provision, constitutes an unenforceable penalty.

As discussed above, the Town takes the position that although the PLA limits the remedies available to Plaintiff, Section 6.01 is not a liquidated damages provision. Nonetheless, if Section 6.01 is a liquidated damages provision as SCDG contends and the trial court found, the interpretation that the liquidated damages is fifteen years of rent constitutes an unenforceable penalty. The Town raised this issue at trial, and the trial court never addressed it.[6]

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[5] In its order filed July 13, 2020, the trial court cited Section 6.01 of the PLR which states: "Both parties … agree that the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the cost of trial and any appeals." (R. 1205). Relying that provision, the trial court found that SCDG qualifies as a prevailing party and ordered that it is entitled to an award of attorney's fees and costs. (R. 67). Because the judgment in SCDG's favor should be reversed, the Court is also requested to reverse the award of attorney's fees and costs.

[6] In its order denying the Town's post-trial motions, the trial court states that the Town "argues that the damages provision is an unenforceable penalty, which is an argument that has been repeatedly raised by the Town and rejected by the Court." (R. 76). However, there is

"South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision." *Erie Insurance Co. v. Winter Construction Co.*, 393 S.C. 455, 713 S.E.2d 318, 321 (Ct. App. 2011). "The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." *Moser v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123, 126 (Ct. App. 1999). "The determination does not necessarily depend upon the language used in the contract." *Id*. "Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties." *Id*. In *Erie*, this Court further explained:

> [W]here the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

Erie, 713 S.E.2d at 321. Moreover, "[i]n order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, *it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum*, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach." *Erie*, 713 S.E.2d at 322. (Emphasis added). "When … the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an

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no record of the trial court ever addressing or adjudicating the merits of the unenforceable penalty issue. This issue, however, is preserved for appellate review because the Town attempted to obtain a ruling on this issue pursuant to Rule 52(b), SCRCP. (R. 485).

unenforceable penalty." *Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361, 363 (2002).

In the present case, SCDG argues that "rent payments due under the Agreement" allows it to recover all of the rent payments for the initial fifteen years of the PLA as if it was fully performed. To award fifteen years of the rent due is neither fair nor reasonable, but rather a penalty. Such a remedy is plainly disproportionate to any actual damages suffered by SCDG due to the alleged breach. The record, in fact, reflects that the parking garage project was completed in 2017, and has been operational since that time. Tyler Flesch testified that the parking garage has been "successful" and at the time of trial had "served over 150,000 transient parkers." (R. 650-652). Thus, the SCDG has received revenue from parking fees and will presumably continue to do so through the fifteen year term. At the time of trial in February 2020, the parking garage had been operational for approximately thirty months, meaning that SCDG (and its joint venturer) had approximately 60,000 transient parkers per year. If each patron paid three dollars in parking fees, that would equal the $185,000 yearly rent payment that would have been paid by the Town, not including any "adjustments" under Section 1.07, meaning that SCDG sustained no actual damages. Realistically, the parking fees for each patron have far exceeded three dollars. Assuming that the average parking fee is $10, the total revenue would be more than three times the yearly rent payment, which again shows that SCDG incurred no actual damages.

It is again important to recognize that the Town was barred by the trial court from conducting discovery regarding the financial performance and operation of the parking garage. As discussed in more detail below, the trial court erroneously denied a motion to compel seeking the types of financial information which would have allowed more precise evidence of the revenue stream already received by SCDG. (R. 16-26). Thus, the Town was denied the

opportunity to show with more precision how SCDG has incurred no actual damages, and instead, has actually profited from the termination of the PLA.

In sum, the evidence in the record, despite the trial court's denial of the motion to compel, is still sufficient to demonstrate without reasonable dispute that the yearly rental payments, if a stipulated sum, are plainly disproportionate to any actual damages (or probable damages) already sustained by SCDG or that will be sustained over the fifteen year period. Clearly, the liquidated damages provision, as claimed by SCDG, constitutes an unenforceable penalty. The trial court erred in failing to address this issue and reach that obvious conclusion.

III. The trial court abused its discretion in denying the Town's motion to compel seeking financial records related to the operation of the parking garage which were discoverable under Rule 26(b)(1), SCRCP.

The trial court abused its discretion in denying the Town's motion to compel filed October 22, 2019. By way of background, the Town's counsel took a supplemental deposition of Tyler Flesch, a member of SCDG, who had been identified as the witness to discuss SCDG's damages calculation. This occurred after SCDG withdrew its financial expert witness on July 23, 2019. During the deposition taken on August 8, 2019, Flesch refused to answer questions directly related to mitigation requirements and the "Net Operating Profit" of the parking garage, explaining that SCDG assigned its ownership and management interests the day it filed suit against the Town to a new entity, 101 Coleman Partners, LLC. Flesch took the position that the Town was not allowed to consider mitigation in the calculation of damages. He also stated all financial records related to the operation of the parking garage were maintained by 101 Coleman Partners, LLC.

In response to those representations, the Town issued a subpoena to 101 Coleman Partners, LLC on August 14, 2019. The Town received a written response from counsel for 101 Coleman Partners, LLC on August 26, 2019, objecting to the request claiming (1) the Town should seek the records from SCDG as it is a member of 101 Coleman Partners, LLC and has access, and (2) the information sought is not relevant to the case. (R. 158).

On August 5, 2019, the Town had also served a second set of requests for production on SCDG making fifteen separate requests for documents related to the financial performance of the parking garage. (R. 154-156, 393-400). SCDG produced no documents in response to those requests for production. Instead, SCDG objected to thirteen of the fifteen request at least in part on the ground that "[t]he financial information sought is not relevant to any issue in dispute in this case as the parties agreed to a liquidated damages provision in the parking license agreement and information relating to the financial projections for the project would not affect the damages to which Plaintiff is entitled in this case." (R. 393-400).

The Town filed a motion to compel on October 22, 2019, seeking in part an order compelling SCDG to produce documents responsive to the fifteen requests for production. (R. 136-145). By order filed January 22, 2020, the trial court denied that motion. The trial court ruled as follows:

> The Town's motion to compel the production of documents relating to the financial performance and operation of 101 Coleman Partners is denied because the information is not relevant to this litigation and the Town's discovery requests are overly broad. SCDG and the Town agreed to a liquidated damages provision in the parking license agreement, and it fixes damages in the event of a breach. Therefore, the documents requested will not aid in the dispute's resolution and are not relevant to the issue of damages.

(R. 20).

Under South Carolina law, the scope of discovery is governed by Rule 26(b)(1), SCRCP, which provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP. This Court has held that "[i]n South Carolina the scope of discovery is very broad and "an objection on relevance grounds is likely to limit only the most excessive discovery request." *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213, 215 (Ct. App. 1997).

The trial court abused its discretion in denying the motion to compel and depriving the Town of the opportunity to conduct discovery related to SCDG's damages claim, including information that was relevant to issues of mitigation and rent reduction under Section 1.07(b) of the PLA. The trial court found that the financial information was not relevant because Section 6.01 includes a liquidated damages provision. That represents an erroneous construction of the PLA as a matter of law. As already addressed above, the language in Section 6.01 is not a liquidated damages provision but rather is a limitation of liability clause. Moreover, as also discussed above, there is no legal basis for the trial court to rule that Section 1.07(b) has no applicability to the calculation of the rent due under the PLA. Clearly, Section 1.07 sets the Fixed Minimum Rent at $185,000 per "License Year" and that rent is "subject only to the adjustments set forth herein." (R. 1201-1202). Accordingly, those "adjustments" are a part of the calculation of the yearly rental payment and, contrary to the trial court's ruling, were not

extinguished upon the termination of the PLA by SCDG.

In sum, the denial of the motion to compel deprived the Town of valuable and needed financial information that would have provided relevant and admissible evidence for mitigation purposes, to address the "adjustments" to the Fixed Minimum Rent through the date of trial, and to determine the probable damages for future "License Years." Moreover, even assuming the trial court is correct that Section 6.01 is a liquidated damages provision, this discovery was still relevant to a determination whether the liquidated damages amount constitutes an unenforceable penalty. The financial information would have been relevant to showing with more precision whether the sum stipulated is plainly disproportionate to the actual damages (or probable damages) resulting from any breach of contract. As a result, the Town is entitled, at the very least, to a new trial absolute on issues of liability and damages.[7]

[7] The new trial must include both issues of liability and damages. *See*, S.C. Code Ann. § 15-33-125. SCDG did not move for nor was it entitled to judgment as a matter of law on liability.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Town of Mount Pleasant respectfully requests that the Court reverse the judgment entered in favor of the Respondent Shem Creek Development Group, including the award of attorney's fees and costs, and remand for entry of judgment in favor of the Town. In the alternative, the Appellant Town requests that the Court remand for a new trial absolute on all liability and damages issues in accordance with S.C. Code Ann. § 15-33-125.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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