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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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 23, 2017, Respondent Shem Creek Development Group, LLC ("SCDG") commenced this action in the Court of Common Pleas for Charleston County against Appellant Town of Mount Pleasant for breach of a parking license agreement ("PLA"). Under the PLA, SCDG agreed to construct a parking garage and office complex and rent 132 parking spaces to the Town for public use for a period of 30 years in exchange for the Town's payment of $185,000 in annual rent for a 15-year rental term. (R. pp. 98-112.) SCDG alleged that the Town anticipatorily repudiated the PLA in response to public opposition to the project and interfered with SCDG's performance under the PLA by (1) enacting zoning amendments that reduced the buildable area on the project site; (2) rejecting reasonable interpretations of the Town's zoning ordinances that would have allowed SCDG to deliver all 132 public parking spaces; (3) refusing to pay rent into escrow upon commencement of construction; and (4) refusing to provide an estoppel certificate. (*Id.*)

The action was assigned to the Business Court on March 7, 2018. (R. p. 1.) The Honorable Judge Maite Murphy was assigned as the presiding judge. (*Id.*)

On October 22, 2019, the Town filed a motion to compel discovery responses from SCDG and a subpoena response from 101 Coleman Partners, LLC, a third-party which now owns and operates the parking garage. (R. pp. 136-185.) The Town's motion to compel sought financial and parking records related to 101 Coleman Partners' operation of the parking garage. (*Id.*) The trial court provided notice of its

denial of the motion to compel on December 11, 2019, which was followed by a written order issued on January 22, 2020. (R. p. 566; R. pp. 16-26.)

The case was tried non-jury by Judge Murphy from February 3-6, 2020. On July 13, 2020, the trial court issued a final order entering judgment in favor of SCDG in the amount of $2,604,316.00, which was based on past unpaid rent, plus statutory prejudgment interest, and the present value of future rent under the PLA. (R. pp. 27-72.) In the final order, the trial court concluded that the Town had anticipatorily breached the PLA by repudiating it and further breached it by failing to pay rent and provide an estoppel certificate. (*Id.* at ¶¶ 60-63.) Also, the trial court found that the Town had breached the implied covenant of good faith and fair dealing in the PLA by taking actions that interfered with SCDG's ability to perform fully under the contract. (*Id.* at ¶¶ 64-72.) In ruling in favor of SCDG, the trial court rejected all of the Town's defenses attempting to justify its failure to perform its obligations under the PLA. (*Id.* at ¶¶ 73-100.)

On July 20, 2020, the Town filed Motions for New Trial and To Reconsider, Alter or Amend Order under Rule 52(b) and Rule 59(a) and (e), SCRCP. (R. pp. 470-487.) The trial court denied those motions on September 17, 2020. (R. pp. 73-87.) The Town filed its notice of appeal on October 16, 2020. (R. pp. 1544-1546.) The trial court subsequently awarded attorneys' fees and costs to SCDG under the PLA by order issued on January 11, 2021. (R. pp. 88-97.)

STATEMENT OF FACTS

I. The Concept

SCDG was formed around 2013 to build and operate a parking garage and office building on the corner of Mill Street and Coleman Boulevard in the Shem Creek area of Mount Pleasant, South Carolina. (R. p. 568.) The site was selected following the Town's adoption of a revitalization plan for the Coleman Boulevard corridor in Mount Pleasant. (R. pp. 569-572.) In that plan, the Town identified the corner of Mill Street and Coleman Boulevard as a potential site for a parking garage. (*Id.*; R. pp. 1161-1163.) The Town recognized that additional parking provided on the site would help revitalize the area and alleviate parking congestion from visitors to Shem Creek and its restaurants that had been spilling into a nearby neighborhood. (*Id.*; R. pp. 571-572.)

After an initial study demonstrated that there was insufficient demand to support a stand-alone parking garage, SCDG's principals approached the Town in 2013 about a public-private partnership in which SCDG would construct a dual-purpose structure consisting of separate office and parking components. (R. pp. 572-579.) Under the proposed public-private partnership, SCDG would construct, own, and operate the office building and parking garage, and the Town would rent spaces that would be reserved for public parking.

II. The Agreement

After SCDG's principals received a positive response from the Town about the public-private partnership, the parties began negotiating a parking license

agreement that would establish the parties' respective rights and obligations. (R. pp. 569, 584-586, 865-866, 974; R. pp. 1284-1289.) Overall, the parties came to quick agreement about the principal terms of the PLA, which included the following: (a) SCDG would construct the structure in a form substantially similar to the conceptual rendering of SCDG's architect, which would include 276 total spaces; (b) the Town would pay rent to reserve 132 of those 276 total spaces for public parking on weekdays from 6 AM to 5 PM; (c) the remaining 144 spaces would be reserved for office tenants on weekdays from 6 AM to 5 PM and reserved for public parking at all other times; (d) the license term was 30 years; (e) the Town would pay to SCDG annual rent of $185,000 for a period of 15 years; (f) the rent could be reduced on a pro rata basis if the garage earned a net operating profit; (g) SCDG would be responsible for financing, constructing, operating, and maintaining the structure; and (h) the Town would have no obligations or risks with respect to the parking spaces beyond paying annual rent. (R. pp. 585-600; R. pp. 1200-1213.)

One of the few issues subject to negotiation during the drafting of the PLA was the remedies available to SCDG if the Town defaulted. (R. pp. 702-706.) As originally drafted, the PLA's default clause provided that SCDG could accelerate all rent payments such that they became immediately due and owing upon the Town's default. (*Id.*; R, pp. 1290-1304.) In addition, SCDG could recoup all expenses incurred in repossessing the premises, subject to the Town's liability being potentially reduced by sums received if SCDG relet the premises. (*Id.*) The original language also omitted any limits on SCDG's ability to recover consequential damages. (*Id.*)

The Town, however, rejected the original language in the default clause and instead proposed fixing the Town's potential liability to the rent payments due under the PLA. (*Id.*; R. pp. 702-706.) The Town's proposed language expressly provided that SCDG "shall be entitled to bring an action for specific performance or breach of contract against [the Town], but agrees that it [sic] sole and exclusive remedy [for the Town's default] shall be Rent Payments due under this Agreement." (R. pp. 1290-1304.) The proposed revision further stated that "[b]oth parties waive any claims that either may have to any consequential or punitive damages." (*Id.*) Also, the Town's proposed revisions did not include any language allowing the Town's liability to be reduced by income earned from other sources. (*Id.*)

In October 2013, the parties entered into the PLA. (R. p. 601; R. pp. 1200-1213.) The Town's revisions to the default clause were included in the executed document, which provides:

> Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceedings, then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. 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 costs of trial and any appeals.

(*Id.* at § 6.01.) The PLA also includes a "Rights and Remedies" clause that states that the "various rights and remedies herein granted to Licensor shall be cumulative and in addition to any other which Licensor may be entitled by law or in equity, and the exercise of one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy." (*Id.* at § 6.02.) The parties further agreed to a survival clause, which provides that the "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." (*Id.* at § 8.17; R. pp. 709-710.)

Based on the Town's commitments under the PLA, SCDG began pursuing the project in earnest at its considerable expense. To facilitate the project, SCDG bought out the existing lease on the project site and engaged a new architect to design the project. (R. pp. 586, 590, 601, 686, 719-721, 728-729, 828.)

As the parties finalized the PLA, they were also working cooperatively on a zoning code amendment to make the project economically feasible and maximize the number of spaces provided in the garage. (R. pp. 602-609; R. pp. 1214-1219.) The amendment, which consisted of increasing the allowable height to permit two stories of parking and two stories of office space and eliminating flood proofing and retail requirements on the first floor, was passed overwhelmingly by the Town's council in December 2013. (*Id.*; R. pp. 602-609, 816-820, 974-978.)

III. The Backlash

As the project was being designed in early 2014, cooperation from the Town began to diminish when public opposition arose. (R. pp. 609-611.) The opposition was led by a group called Save Shem Creek, which was organized to stop the garage from being constructed. (*Id.*) According to the Town's administrator, the garage project became the most controversial development project in the Town's recent history. (R. pp. 863-864.) With public opposition growing, the Town took actions that negatively impacted the project and SCDG's ability to provide all 132 public spaces envisioned under the PLA. (R. pp. 612-646.)

In April 2014, the Town enacted a zoning code amendment that increased the setback requirements and created an "activity zone" requirement for only a few parcels, including the project site, thereby reducing the site's buildable area. (R. pp. 612-624; R. pp. 1239-1279.) At the time the Town was considering the zoning amendment, SCDG's architect was designing the project with 5' setbacks, as allowed under the existing zoning code. (R. pp. 1047-1048, 1061.) Although the zoning amendment applied to only a few parcels and was expressly intended to reduce the usable area on the project site, the Town did not directly provide SCDG notice or seek SCDG's input about the zoning amendment. (R. pp. 614-615, 619-620, 821-822, 979-984, 985-987, 1057.)

During the same week that the Town gave final reading to the zoning amendment, SCDG's architect had scheduled a pre-submittal meeting with the Town's planning staff to present the preliminary design of the project. (R. pp. 1314-

1315; R. pp. 1054-1058.) The preliminary design included 266 total parking spaces based on 5' setbacks, which unbeknownst to SCDG and its architects had been increased just days earlier. (R. pp. 622-623; R. p. 1316.) During this pre-submittal meeting, the Town's planning staff informed the architect that the proposed design did not comply with the Town's newly enacted zoning amendments that required 20' setbacks and an activity zone. (R. pp. 1314-1315; R. pp. 613-614, 1054-1058.) Based on this information, SCDG's architect determined that compliance with the new zoning amendments would result in a loss of parking spaces designed for the garage. (R. pp. 622-624.)

Over the next few months, SCDG sought from the Town several reasonable accommodations and interpretations of the zoning code that would maintain the number of designed spaces and enable SCDG to provide 132 public spaces under the PLA. (R. pp. 625-648; R. pp. 1280-1281, 1282-1283, 1310-1313.) For example, SCDG's architect argued for an interpretation that a 5' rear setback should apply to the back of the building as set forth in the zoning code, but the zoning administrator insisted that a 20' side-street setback should apply to the rear of the building. (R. pp. 1064-1070.) That interpretation alone resulted in the loss of sixteen spaces in the parking garage. (*Id.*)

Also, SCDG requested that the parking garage be deemed a "civic use" under the Town's zoning code because civic uses are exempted from the strict requirements for build-to lines, setbacks, and other design elements. (R. pp. 628-642; R. pp. 1282-1283, 1310-1313.) Instead, the design elements for civic uses are determined by the

Town's planning staff in the design review process. (Town Zoning Ordinance § 156.329(N)(5).)[1] At the time, the Town's zoning ordinance defined "civic use" to mean:

> Utility, educational, recreational, cultural, medical, protective, governmental, and other uses that provide public or quasi-public services and are strongly vested with social importance. Examples may include, but are not limited to the following: city halls; post offices; police and fire stations; schools; museums; universities; public parks; meeting halls; libraries; transit centers; and parking structures.

(Town Zoning Ordinance § 156.007) (emphasis added). If the Town had deemed the parking garage a "civic use," the Town's planning staff could have approved reduced setbacks and 8 ½' wide stalls, which would have increased the number of spaces in the garage. (R. pp. 639-640; Town Zoning Ordinance § 156.329(N)(5).)

The Town rejected SCDG's request for the parking garage to be considered a civic use. Although the Town's zoning code defined "civic use" to expressly include "parking structures," the Town's attorney incorrectly informed SCDG that "civic use" was not defined by the zoning code. (R. pp. 1282-1283.) He further opined that the parking garage "does not appear to meet any reasonable definition of the term" even though the parking garage was a public-private partnership created to provide public parking and was supported by public funds. (*Id.*)

Ultimately, the Town rejected these and all other attempts by SCDG to provide as many spaces as possible in the garage. (R. pp. 625-648, 876, 1064-1070.) As a

[1] This citation refers to the zoning ordinance section in effect at the time of the request.

result, SCDG designed the garage under the new zoning requirements as interpreted by the Town's staff, which resulted in 234 total parking spaces, 117 public spaces, and additional surface parking on adjacent property. (R. pp. 648, 824, 1076.) The Town approved the modified design in September 2014. (R. pp. 678, 1076.)

IV. The Repudiation

In October 2014, SCDG requested that the Town provide an estoppel certificate confirming that construction of the garage in conformance with the approved design would satisfy SCDG's obligations under the PLA. (R. pp. 1307-1309; R. pp. 671-675.) Under Section 7.04 of the PLA, the Town, upon request, was required to deliver an estoppel certificate that the PLA was in full force and effect or any defenses thereto. (R. p. 1206 § 7.04.) However, the Town rejected SCDG's request and instead sent SCDG a letter stating that the design did not include sufficient parking spaces to comply with the PLA. (R. pp. 1220-1222; R. pp. 675-678, 825.)

In response, SCDG approached the Town about resolving the dispute about whether SCDG's approved design satisfied the requirements of the PLA. (R. pp. 678-683.) The parties then negotiated a proposed amendment under which the parking garage would consist of 234 total spaces and 117 public spaces and annual rent would be reduced from $185,000 to $163,800. (R. pp. 1223-1230; R. pp. 678-683, 825-828.)

The proposed amendment to the PLA was considered by Town Council at its meeting in February 2015. Prior to considering the proposed amendment, the Town administrator presented his analysis of whether SCDG's approved design satisfied the PLA consistent with his prior letter. (R. pp. 877-878, 879-889; R. pp. 1231-1237,

1238; R. pp. 1379-1422.) Town Council then unanimously "endorsed" the Town administrator's letter and approved a motion denying any new proposal that may be put forward or submitted by SCDG pertaining to the PLA. (R. pp. 1379-1422.) In discussing this action, Town council members explained that the purpose of the motion was to make it clear that no government money should be spent on the project regardless of the number of spaces. (*Id.*)

V. The Completion

Throughout the design process, SCDG remained committed to building the parking garage, and it persisted in its efforts to complete the project despite the obstacles created by the Town. (R. pp. 647-648, 653-657, 665-666, 686.) As a result of the "activity zone" requirement created by the April 2014 zoning amendment, SCDG was forced to redesign the building and shift its footprint from its original location. (R. pp. 645-647.) However, the boundary of SCDG's leased parcel could not accommodate the shift, and SCDG had to lease more land from the landlord at a considerable expense to make the project work. (*Id.*)

Also, the Town's refusal to provide an estoppel certificate and confirm its obligations to pay rent impacted the financial and ownership structure for the project. (R. pp. 671-675.) The estoppel certificate was important to potential lenders who desired assurances that the Town, backed by its highly-rated AAA credit, would pay rent as required by the PLA, and the Town's refusal to provide these assurances negatively impacted financing for the project. (*Id.*) As a result, SCDG was forced to partner with an equity investor to create a joint venture, 101 Coleman Partners, LLC,

to own, build, and operate the office building and parking garage. (R. pp. 716, 828, 1086-1087.) In so doing, SCDG relinquished its sole ownership of the project and retained only a 15% membership interest in the joint venture.[2] (R. p. 828.)

In June of 2016, SCDG provided notice to the Town that it was in breach of the PLA by anticipatorily refusing to pay rent, refusing to provide an estoppel certificate, and violating the covenant of good faith and fair dealing by taking actions to interfere with SCDG's performance under the PLA. (R. pp. 707-709; R. pp. 1305-1306.) As a result, SCDG terminated the PLA. (*Id.*)

101 Coleman Partners completed the project and received a certificate of occupancy for the garage in July 2017. (R. pp. 781-782; R. p. 1472; R. pp. 1318-1319.) The date of the issuance of certificate of occupancy served as the rental commencement date under the PLA, which is when the Town's first annual rental payment would have been released from escrow pursuant to Sections 1.07 and 1.10 had the Town made the escrow payment and not repudiated the PLA. (R. pp. 1201-1202 §§ 1.07 and 1.10; R. p. 782.)

[2] The Town incorrectly claims that there is no evidence in the trial record to support the trial court's findings that SCDG partnered with an equity investor and only retained a 15% membership in the joint venture. (*See* App.'s Initial Br. p. 17, fn. 4.) However, both of SCDG's principals who were witnesses during trial testified to this fact. (R. pp. 665-666, 716, 828.) In addition, 101 Coleman Partners' ownership and operation of the garage was a key issue in the Town's motion to compel, and SCDG presented ample information demonstrating these facts in opposition to the Town's motion. (R. pp. 186-420; R. pp. 383-388, 402-417.)

VI. The Lawsuit and Trial

As a result of the Town's actions, SCDG filed this action in October 2017, asserting a claim for breach of contract based on the Town's repudiation of the PLA and failure to provide an estoppel certificate, accept the garage, and pay rent. (R. pp. 98-112.) The case was tried as a non-jury matter over four days in February 2020, with Judge Murphy presiding. Because it was undisputed that the Town had failed to provide an estoppel certificate and pay rent as required under the PLA, the central issues at trial surrounded whether SCDG's approved design of 117 public spaces, which was 15 less than envisioned under the PLA, justified the Town's non-performance.

After completion of the trial, the trial court issued an order entering judgment in SCDG's favor on the breach of contract claim. (R. pp. 27-72.) The trial court concluded that the Town had committed an anticipatory breach by repudiating the PLA and further breached it by failing to pay rent and provide an estoppel certificate. (R. pp. 48-49 at ¶¶ 60-63.) The trial court also found that the Town breached the implied covenant of good faith and fair dealing in the PLA by taking actions that prevented SCDG from developing the parking garage as envisioned under the PLA and receiving rent thereunder, including (1) adopting zoning amendments that forced SCDG to redesign the garage and provide fewer spaces than originally planned; and (2) rejecting reasonable interpretations of zoning ordinances that would have enabled SCDG to develop the project with the number of public spaces envisioned under the PLA. (R. pp. 49-55 at ¶¶ 64-72.)

In awarding judgment to SCDG, the trial court also rejected the Town's defenses attempting to justify its non-performance under the PLA. (R. pp. 55-66 at ¶¶ 73-100.) The court found that SCDG's design of 89% of the public spaces contemplated by the PLA constituted substantial performance and that any deficiency in the number of spaces provided was not a material breach justifying forfeiture of the PLA. (R. pp. 56-62 at ¶¶ 75-89.) The court's ruling on this issue was primarily based on the Town's receipt of the benefits it sought in the PLA, specifically increased parking and revitalization of the area, and the Town's failure to conduct any analysis of whether 117 public spaces were inadequate to meet demand. (*Id.*)

Based on these findings, the trial court awarded damages to SCDG in the amount of $2,604,316 for (1) unpaid past rent from the date the certificate of occupancy was issued for the garage through the approximate date of trial, plus statutory prejudgment interest, and (2) future rent through the remainder of the rental term discounted to net present value as of the approximate date of trial. (R. pp. 66-67 at ¶¶ 101-103.)

At trial, the Town did not contest SCDG's methodology of calculating rent. (*Id.* at ¶ 102.) Instead, it argued that SCDG was not entitled to rent after the date SCDG terminated the PLA. (*Id.*) The trial court rejected that argument because the default and survival clauses, when considered together, evidenced "the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the PLA." (*Id.*)

ARGUMENT

I. THE TRIAL COURT CORRECTLY AWARDED DAMAGES TO SCDG IN AN AMOUNT EQUAL TO THE PRESENT VALUE OF RENTAL PAYMENTS DUE UNDER THE PLA.

The trial court correctly ruled that SCDG was entitled to damages in the amount of rent due to be paid by the Town for the fifteen-year rent period under the PLA. The Town contends, however, that the trial court misinterpreted the applicable provisions of the PLA to conclude that the Town was liable for rent due after the termination of the PLA. In making this argument, the Town does not contest the trial court's findings of fact that the Town breached the PLA and violated its duty of good faith and fair dealing by interfering with SCDG's performance under the PLA. Instead, it seeks to be shielded completely from any liability for repudiating its obligations under the PLA based on a strained interpretation of the PLA's default clause. Put simply, the Town argues that it should be allowed to breach its contractual obligations with impunity.

A. The trial court correctly interpreted Sections 6.01 and 8.17 of the PLA as providing for the recovery of rent payments due after the Town repudiated the PLA.

Because the trial court's award of damages was based on its interpretation of Sections 6.01 and 8.17 of the PLA, the Town's appeal necessarily involves a matter of contractual construction. Courts should construe the contract liberally "to give effect and carry out the intention of the parties." *Bluffton Towne Ctr. v. Gilleland-Prince*, 412 S.C. 554, 569, 722 S.E.2d 882, 890 (Ct. App. 2015). This requires that the court give effect to all provisions of the contract without isolating any particular clause. *Id.*

Construed together, Sections 6.01 and 8.17 of the PLA reveal that the parties intended for the Town to be liable for all rent due under the PLA, regardless of whether such rent was due after the Town defaulted or after SCDG terminated the PLA. Section 6.01 provides that if the Town defaults under the PLA, SCDG "shall be entitled to bring an action for specific performance or breach of contract against [the Town], but agrees that it[s] sole and exclusive remedy shall be the Rent Payments due under this Agreement." Nothing in this language, which was drafted by the Town, limits recovery to only rent that had accrued at the time of default or termination. If the parties had intended Section 6.01 to prohibit recovery of future rental payments, it could have done so by expressly providing that SCDG's exclusive remedy was only rent that had accrued at the time of termination or by expressly prohibiting recovery of rent due after termination of the PLA. But the parties did not agree to any such limitation.

Instead, the parties agreed that the Town's obligation to pay rent continued after termination of the PLA pursuant to Section 8.17 of the PLA, which provides that the "provisions of this License with respect to any obligation 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." The plain language of Section 8.17 expresses the parties' intent that the Town's obligation to pay rent survives the expiration or other termination of the PLA because rent is the only payment obligation that the Town had under the PLA. (R. pp. 709-710.) Thus, any construction of the PLA that nullifies the Town's obligation to pay rent after

termination of the PLA would render the survival clause in Section 8.17 meaningless and would lead to an absurd result. *See Stevens Aviation, Inc. v. DynCorp Inc.*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.")

Therefore, the trial court correctly construed Sections 6.01 and 8.17 together as evidencing "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." Thus, the award of damages for the entire 15-year rental period was appropriate and should be affirmed.

B. The Town's interpretation of the terms "due," "obligation," and "owing" is inconsistent with South Carolina authority and the terms' plain and ordinary meaning.

In challenging the trial court's interpretation, the Town advances an alternative interpretation that Section 6.01 provides an exclusive remedy for only "the rent payments already incurred and owed *at the time of the termination of the contract*." (Initial Br. p. 13.) The Town arrives at this conclusion based on the interpretation of the term "due" as meaning "owed or owing" but then applies that interpretation in a manner that is inconsistent with term's plain and ordinary meaning and usage. According to the Town, the phrase "Rental Payments due under this Agreement" in Section 6.01 applies only to rental payments that had matured or accrued at the time of termination of the PLA. Under this interpretation, the Town

cannot be liable for its breach of the PLA for any amount because SCDG terminated the PLA based on the Town's default prior to any rental payments accruing.

South Carolina courts, however, have never interpreted or used the term "due" in such a limited manner that precludes its applicability to future indebtedness or payments due under an agreement. Instead, South Carolina courts have consistently defined or used the term "due" to apply to future debts and payments, going as far back as nearly a century ago.

In *Ex parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922), the South Carolina Supreme Court rejected an interpretation of the term "due" similar to the one advanced by the Town here. In that case, the borrower argued that the phrase "may be due" as used in a mortgage should be construed to apply only to subsisting indebtedness at the time the mortgage was given and should not apply to subsequent indebtedness incurred after the mortgage. But the trial court rejected that interpretation and instead found:

> In my opinion the words 'may be due,' contemplate future indebtedness. The phrase has a prospective slant. **The use of the word "due" does not necessarily imply that the debt has matured. It is often used by business men in the sense of "owing irrespective of the time of payment**."

Id. (emphasis added). Thus, the trial court ruled that the term "may be due" applied to future indebtedness, and on appeal, the Supreme Court affirmed and adopted the trial court's holding. *Id.*

More recently, this Court in *Bluffton Towne Ctr.* used the term "due" to apply to future rent payments owed under a lease. In that case, the Court of Appeals held

that a tenant was liable for future rent payments after the landlord terminated the lease based on the tenant's abandonment. 412 S.C. at 570, 772 S.E.2d at 891. In so doing, the Court repeatedly used the term "due" to apply not only to rent due at the time of termination but also to future rent due after the landlord terminated the lease:

- "[T]he parties clearly and unambiguously intended for [landlord] to reserve all rights against Tenant for rents **due** during the full term of the lease." *Id.* at 569, 772 S.E.2d at 890 (emphasis added).

- "Regarding the lease as a whole, we find the parties clearly and unambiguously intended that, upon default, Tenant would be liable to [landlord] for the rents **due** during the full term as damages." *Id.* at 569, 772 S.E.2d at 890 (emphasis added).

- "After reading the subject lease as whole, we find the parties clearly and unambiguously intended that – upon Tenant's default and breach of the lease – Tenant would be liable to [landlord] for the rents **due** during the full term as damages." *Id.* at 574, 772 S.E.2d at 893 (emphasis added).

Although the Court in *Bluffton Towne Ctr.* was not interpreting "due" as it appeared in the lease, the Court's use of the term demonstrates that the plain, ordinary, and popular meaning of "due" applies not only to amounts presently due but also to amounts that come due in the future. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000) (declaring that terms in a contract must "be taken and understood in their plain, ordinary, and popular sense").

Significantly, the trial court in this case relied on *Bluffton Towne Ctr.* in awarding damages to SCDG for future rent due under the PLA. Although the Town attempts to distinguish *Bluffton Towne Ctr.* because the default clause in that case

contained different language than that used in Section 6.01 of the PLA, the Town cannot credibly dispute that this Court used the term "due" as applying to future rent, which is contrary to the Town's interpretation of that term in this case.

The only precedent that the Town offers to support its limited definition of the term "due" is *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010), in which the South Carolina Supreme Court defined "due" to mean "owed or owing as a debt." But a close reading of *Mathis* reveals that it has no applicability here.

In that case, the South Carolina Supreme Court held that the South Carolina Payment of Wages Act does not apply to prospective wages. *Id.* at 318-19, 698 S.E.2d at 783-84. The court's holding was based on its interpretation of the term "wages," which is defined in S.C. Code Ann. § 41-10-10(2) to mean "all amounts at which labor rendered is recompensed." *Id.* at 318, 698 S.E.2d at 783. The court interpreted this definition as not including prospective wages based on the statute's use of the past tense of the words "rendered" and "recompensed." *Id.* According to the court, the "past tense of the word 'rendered' suggests services provided in the past. The word 'recompensed' too suggests that payment is for labor already completed." *Id.*

The court's analysis in *Mathis* demonstrates that its definition of "due" does not apply only to past debts that are owed. Although the court defined "due" in its analysis of the meaning of "wages," it clearly based its interpretation on the statute's use of the past tense of "labor rendered." *Id.* "The word 'due' means 'owed or owing as a debt' and, as wages are defined by the Act as amounts paid by **labor rendered**,

no wages can be due for future services." *Id.* (emphasis added). In contrast to the definition of wages in the Payment of Wages Act, Section 6.01 contains no language suggesting that the parties intended "due" to mean only rent owed at the time of termination. Therefore, *Mathis* sheds no light on the interpretation of Section 6.01.

The Town also relies on *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), to argue that the trial court misconstrued the meaning of the term "obligation" and "owing" as they are used in the survival clause found in Section 8.17 of the PLA. However, *Dennis* actually supports the trial court's award of rent payments due after termination of the PLA.

In *Dennis*, the South Carolina Supreme Court ruled that members of a private club had an obligation to continue to pay dues, fees, and other charges after they resigned their membership in the club pursuant to the governing membership documents. The court's decision was based, in part, on its interpretation of a provision stating that "[n]otwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including food and beverage minimums)." *Id.* at 200, 821 S.E.2d at 671. The club members argued that the term "unpaid" as used in the provision meant dues owed at the time of resignation and not dues accruing after resignation. The court rejected that interpretation and found that the term "unpaid" unambiguously meant any payment the club members were "obligated to make according to the terms of the membership documents that has not been made . . . [and] that the membership documents include obligations to pay before and after the date of resignation." *Id.* at 201, 821 S.E.2d at 671.

The court's interpretation of the term "unpaid" in *Dennis* applies equally here. The survival clause in Section 8.17 acts similarly as the relevant provisions in *Dennis* that obligated members to continue paying dues after their resignation. Like the provisions in that case, Section 8.17 provides that the "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. p. 1209 § 8.17.) The term "owing" means "unpaid." *See* Black's Law Dictionary 1279 (10th ed. 2014). Thus, the terms "owing" and "unpaid" as used respectively in Section 8.17 and the membership documents at issue in *Dennis* are synonymous. So just as the obligation to pay "unpaid" dues owing under the membership documents continued after the members resigned in *Dennis*, the Town's obligation to pay rent "owing" under the PLA survives the termination of the PLA under Section 8.17. *See also D&D Leasing Co. v. Lipson*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991) (interpreting "unpaid monthly lease payments" to apply to future lease payments accruing after termination).

Nevertheless, the Town argues that *Dennis* supports its argument that it had no "obligation" to pay rent after the PLA was terminated because of its breach. According to the Town, *Dennis* stands for the proposition that "'obligations' are debts already incurred and thus due or owing, while 'commitments' are debts that will come due in the future after the termination." (App.'s Initial Br. p. 14.) The Town then argues that the use of the term "obligation" in Section 8.17 without any mention of

"commitments" means that future rental payments cannot be due and owing under the PLA after it is termination.

Notwithstanding that the Town's interpretation of "obligations" and "due and owing" is contrary to the plain and ordinary usage of those terms in their common sense, as well as inconsistent with how those terms have been interpreted by the courts, the Town misreads *Dennis*. In its discussion of the terms "obligations" and "commitments," the *Dennis* court explained how those terms were expressly used in the statutory language of the Nonprofit Corporations Act. *Dennis*, 425 S.C at 205, 821 S.E.2d at 673 (interpreting S.C. Code Ann. § 33-31-620(b)). However, the court did not hold that "obligations" means only debts incurred before termination.

Instead, the court held just the opposite – the club members had an "obligation" to continue to pay dues after their resignation. The court used the terms "obligated" and "obligation" repeatedly to refer to dues accruing after resignation:

- "This language unambiguously provides the [club members] are **obligated** to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." *Id.* at 200, 821 S.E.2d at 673 (emphasis added).

- "'Unpaid' means any payment the [club members] are **obligated** to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include **obligations** to pay before and after the date of resignation." *Id.* at 201, 821 S.E.2d at 671 (emphasis added).

- "When the [club members] entered into this membership agreement, they accepted the **obligation** to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also received the benefit of knowing that if

> other members experienced those circumstances, the other members would likewise be **obligated** to continue to make their payments." *Id.* at 202, 821 S.E.2d at 671 (emphasis added).

Therefore, the Town's argument that the term "obligation" as used in Section 8.17 means only those debts accruing before termination of the PLA is directly contradicted by the only decision on which it relies to support its argument.

In sum, Sections 6.01 and 8.17 of the PLA unambiguously provide that the Town continues to be liable for rental payments due under the PLA after termination resulting from a breach by the Town. And the Town's strained interpretations of the terms "due," "owing," and "obligation" are contrary to their plain, ordinary meaning.

C. The trial court properly reduced future rent payments to present value.

In awarding SCDG damages for future rental payments due after the date of trial, the trial court properly reduced those damages to present value. Section 6.02 of the PLA provides that the parties agreed that the "various rights and remedies herein granted to Licensor shall be cumulative and in addition to any others to which Licensor may be entitled by law or in equity, and the exercise of one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy." (R. pp. 1205-1206 § 6.02.) Under this section, SCDG had the additional right to recover the present value for all unaccrued rental payments that the Town would have made had it not anticipatorily repudiated the PLA.

Damages for a breach of contract arising from repudiation of a contract are computed as of the date fixed for performance and not the date of repudiation. *See Brooke v. Laurens Milling Co.*, 78 S.C. 200, 206, 58 S.E. 806, 808 (1907) (holding that

damages for repudiation are estimated as of date the contract was to be performed and not date of repudiation). "This amount must be reduced to its present value. Judgment should be rendered for all accrued payments plus interest, plus the present value of all unaccrued payments the plaintiff would have received if the contract had been performed." 22 Am. Jur. 2d *Damages* § 76.[3] If this formula cannot be used, then the only alternative for the court is to order specific performance of the obligation to pay future installments. *Id.*

In this case, the trial court concluded that the Town anticipatorily repudiated the contract, and the Town does not challenge this ruling on appeal. Although the parties liquidated SCDG's damages to the rental payments due under the PLA, SCDG reserved all other rights and remedies available under law and equity in Section 6.02. Under the principles of contract law discussed above, those remedies include the right to receive future payments reduced to present value. Thus, the trial court's award of future damages accords with both the PLA and contract law recognized by South Carolina courts.

Alternatively, the trial court could have ordered specific performance by requiring that the Town make future rental payments as they would have come due during the remainder of the rent period under the PLA if those payments could not

[3] Significantly, this principle of contract law has been adopted by this Court. *See Allegiant v. Emerald Inns Inc.*, Unpub. Op. No. 2007-UP-325, 2007 S.C. App. Unpub. LEXIS 373, *6 (Ct. App. June 15, 2007) (ruling that proper award of damages in breach of lease case included future rent payments reduced to present value).

be reduced to present value.[4] However, SCDG presented evidence of the present value of the future rental payments accruing after trial, and the Town did not contest that evidence in any way. (R. pp. 710-714; R. p. 1317.) As a result, the trial court's determination of the present value of the future rental payments is supported by the evidence at trial, and its award should be affirmed.

The Town argues, however, that the trial court's award of future damages was incorrect because it effectively rewrote the contract to include a rent acceleration clause. In support of this argument, the Town points to the parties' revision of Section 6.01 that eliminated language providing that, in the event of the Town's default, SCDG could accelerate the payment of all remaining rent payments "such that they shall then be immediately due and owing." (R. pp. 1290-1304.) The Town construes the parties' deletion of this language as somehow relieving the Town from any future obligations to pay rent after termination of the PLA, despite the presence of the survival clause in Section 8.17.

Here, the Town misunderstands the operation of an acceleration clause and how it is distinguishable from the award of future rent payments discounted to present value. Under the acceleration clause deleted by SCDG and the Town, all rent due for the remainder of the rental period would have come immediately due and

[4] In its initial brief, the Town concedes that, if future rent payments are recoverable under the PLA, a proper remedy would have been for the trial court to order the Town to make future rent payments as they come due. (*See* App.'s Initial Br. p. 18.) Thus, if the Court determines that the trial court erred in reducing future rent to present value, then it should remand the case for the trial court to award specific performance requiring the Town to make such payments.

payable upon the Town's breach of the agreement without being discounted to present value. (R. p. 789.) As one court has stated, "making all payment due immediately, without any discount to present value, is precisely what any acceleration clause is intended to do." *Paramount Pictures Corp. v. Johnson Broad., Inc.*, C/A No. H-04-03488, 2006 U.S. Dist. LEXIS 31433, *10 (S.D. Tex. May 19, 2006); *see also Allegiant v. Emerald Inns Inc.*, Unpub. Op. No. 2007-UP-325, 2007 S.C. App. Unpub. LEXIS 373, *3, 6 (Ct. App. June 15, 2007) (ruling that trial court erred in accelerating all future rent payments instead of discounting them to present value).

But the trial court did not accelerate rent. Instead, it awarded SCDG (1) unpaid past rent as of the date of trial plus prejudgment interest on each past installment calculated from when each past installment payment would have come due and (2) future rent for rent accruing after trial with each installment discounted to present value from the date each installment would have come due.

While this distinction may seem minor when explained in words, its significance is magnified when applied to the amount of the Town's rental payments due over the entire rent period. The trial court found that the Town breached the implied covenant of good faith and fair dealing in April 2014 with its actions interfering with SCDG's performance of the PLA and repudiated the PLA in February 2015. (R. pp. 49-55 ¶¶ 62-72.) If the court had accelerated all rent as being immediately due and payable upon the Town's breach in 2014, then SCDG could have recovered a total award of approximately $4.2 million based on all fifteen years of annual rent payments totaling $2,775,000 plus annual prejudgment interest of

$242,812.50 (*see* S.C. Code Ann. § 34-31-20(A)), accruing from April 2014 through the trial date six years later. If the rent payments would have been accelerated to the Town's repudiation of the breach in February 2015, the total award would have been just shy of $4 million.

The comparison of the trial court's award to an award based on the acceleration of rent reveals that the Town's argument has no merit. Instead of accelerating rent, the trial court properly applied South Carolina contract law and awarded future rent discounted to present value. Therefore, the trial court's award of damages should be affirmed.

D. The trial court correctly concluded that Section 6.01 is a liquidated damages provision because it fixes damages to rental payments in an amount capable of ascertainment by mathematical computation.

The trial court correctly concluded that Section 6.01 is a liquidated damages provision. A "claim 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." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). Because Section 6.01 fixes damages to rental payments, which are capable of ascertainment by mathematical computation and operation of law, it, therefore, meets the definition of a liquidated damages provision.

The Town argues that Section 6.01 is not a liquidated damages provision because it does not establish a sum certain as damages for a breach.[5] While it is true that Section 6.01 does not fix a sum certain, damages are also liquidated if they are ascertainable by mathematical computation, which is how Section 6.01 operates. Because rental payments are a fixed amount, the amount of damages recoverable under Section 6.01 in the event of a breach can be ascertained by multiplying the rent amount by the number of years that the Town failed to pay rent during the PLA's rental period. Thus, the damages are liquidated under the PLA.

This conclusion is supported by this Court's decision in *D&D Leasing*. In that case, the default clause at issue required the renter to pay as damages the total unpaid monthly lease payments due under the agreement. 305 S.C. at 542, 409 S.E.2d at 795. The court held that the monthly lease payments due after termination were recoverable under the default clause and further ruled that the clause "meets the requirements of a valid liquidated damages clause." *Id.* at 543, 409 S.E.2d at 796.

Like the default clause in *D&D Leasing*, Section 6.01 requires the payment of rent due under the agreement. And although the default clauses in both this case and *D&D Leasing* do not fix a sum certain as damages, the damages under both clauses are ascertainable by multiplying the rental amount by the unpaid

[5] The Town argues that Section 6.01 is a limitation of liability provision rather than a liquidated damages clause. (*See* App. Initial Br. p. 12.) Although Section 6.01 limits the Town's liability by barring compensatory damages, the Town fails to recognize that is exactly what a liquidated damages provision is intended to do. "Liquidated damages provisions allow private parties to reform the fixed concept of compensatory damages for breach of contract, by providing relief in excess, or in lieu, of compensatory damages." 22 Am. Jur. 2d *Damages* § 504.

installments due under the agreements. So just as the default clause in *D&D Leasing* was a "valid liquidated damages clause," so too is Section 6.01.

To avoid this conclusion, the Town argues that the rental payments due under Section 6.01 in the event of a breach are not liquidated because rent is subject to adjustment under Section 1.07(b). This argument, which was properly rejected by the trial court, has several flaws. (R. pp. 22-24.)

First, and most importantly, the Town repudiated the PLA, thereby surrendering its right to rent reduction by virtue of the PLA's termination. The clear and unambiguous terms of the PLA demonstrate that the rent reduction clause only applies during the "Rent Period":

> If at any time during the **Rent Period** of this License should the operation of the Garage result in annual net operating profit, the Licensee shall be entitled to reduce its Fixed Minimum Rent Payment for the following License Year of **the Term** by its pro rata share, based upon the percentage of the Parking Spaces comprising the Public Spaces.

(R. p. 1202 § 1.07(b)) (emphasis added). Thus, for the rent reduction clause to apply, profitability must occur during the "Rent Period," which is defined as "the first fifteen years of the License Term." (R. pp. 1201-1202 § 1.07(a).) And the license term expires upon the termination of the PLA in accordance with its provisions. (R. p. 1202 § 1.10.)

After the Town repudiated the PLA, SCDG terminated it in June 2016, thereby ending the license term and the rent period. Therefore, the rent reduction clause does not apply because there have been no operations of the garage during the rent period.

The trial court also correctly ruled that the Town's rent reduction rights did not survive the termination of the PLA under the survival clause found in Section 8.17. (R. pp. 22-24.) Under that section, the only obligations that survived the termination of the PLA were the Town's obligations to pay rent and perform other acts. Section 1.07(b)'s provision of the Town's "entitle[ment]" to reduce rent in the event of a net operating profit shows that rent reduction is a conditional right and not an obligation of the Town. And the survival clause is silent as to the survival of any rights the Town possessed under the PLA, including rent reduction rights.

This Court's decision in *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 608 S.E.2d 162 (Ct. App. 2005), supports the conclusion that the survival clause and termination of the PLA jointly operate to terminate the Town's rent reduction rights while preserving the obligation to pay minimum rent payments. In *Donahue*, the plaintiff and defendant entered into a contract that gave the plaintiff the right of first refusal to purchase the defendant's rights in a television program hosted by the plaintiff. *Id.* at 335-36, 608 S.E.2d at 164-65. After the contract expired, the defendant assigned its interest to a third party without providing the plaintiff the right of first refusal. *Id.* at 336-47, 608 S.E.2d at 165. The plaintiff then sued the defendant for breach of contract, and the trial court later granted summary judgment to the defendant because the plaintiff's right to first refusal only existed "during the term" of the contract and did not survive the contract's expiration. *Id.*

The Court of Appeals affirmed the trial court, ruling that the contract unambiguously provided that the plaintiff's right of first refusal lasted during the

term of the contract and that he had no such right after the contact expired. *Id.* at 339-40, 608 S.E.2d at 166-67. It also rejected the plaintiff's argument that provisions which granted it rights that survived the term of the contract applied to the right of first refusal by ruling that the plaintiff's right of refusal was "expressly limited to 'the term' of the contract." *Id.* at 340, 608 S.E.2d at 167.

Under *Donahue*, the Town's right to rent reduction did not survive the PLA's termination. Just as the plaintiff in *Donahue* had a right of first refusal that was expressly limited to the term of the contract, the Town's right to rent reduction is expressly limited to the "Rent Period." And as the contract in *Donahue* granted rights that survived the expiration of the contract that did not include the right of first refusal, the PLA includes a survival clause that requires the Town to pay rent after the termination but does not include language maintaining rent reduction rights beyond the termination of the PLA. So just as the plaintiff's right of first refusal was extinguished when the contract expired in *Donahue*, the Town's right to rent reduction was similarly extinguished when the PLA terminated in this case.

In sum, Section 6.01 is a liquidated damages clause because it fixes damages in the form of rent payments in an amount ascertainable by mathematical computation. The express terms of the PLA also render the rent reduction clause inapplicable, and the Town's argument that the rent reduction clause precludes a determination that Section 6.01 is a liquidated damages clause has no merit. Therefore, the trial court's order should be affirmed.

E. Even if Sections 6.01 and 8.17 are ambiguous, the trial court's judgment should be affirmed because its interpretation of those provisions is reasonable, fair, and just and would avoid the absurd result of allowing the Town to repudiate the PLA with impunity.

At most, the Town's interpretation reveals possible ambiguities as to whether the PLA provided for the recovery of rent due after termination and required adjustments for rent reduction.[6] "Construction of an ambiguous contract is a question of fact." *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009). In construing an ambiguous contract, the court should seek to determine the parties' intent. *Id.* Any ambiguity, doubt, or uncertainty as to a contract's meaning should be resolved against the party who is responsible for the ambiguous language. *Id.*

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[6] Although the trial court did not express whether it found the relevant provisions ambiguous, the Court can discern the trial court's intent from the order and make reasonable inferences therefrom. *See Bluffton Towne Ctr.* 412 S.C. at 572, 772 S.E.2d at 892 (stating that an appellate court must construe trial court's intent as discerned from the order as a whole.) If the Court finds that the trial court found the provisions ambiguous, the trial court's construction of the PLA must be affirmed if there is any evidence supporting its construction. *See W. Anderson Water Dist. v. City of Anderson*, 417 S.C. 496, 505, 790 S.E.2d 204, 209 (Ct. App. 2016) (affirming trial court's interpretation of an ambiguous contract under the "any evidence" standard for non-jury trials).

Alternatively, if the Court finds that the trial court erred in finding the provisions unambiguous, then the Court should nevertheless affirm the trial court's judgment under Rule 220(c), SCACR, because the trial court's interpretation of the PLA is reasonable and logical under the canons of construction discussed in this section. *See Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 fn. 2 (1992) (affirming trial court's judgment under Rule 220(c) because trial court's interpretation of contract was reasonable despite incorrectly ruling that it was unambiguous).

"Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). "Common sense and good faith are the leading touchstones of the construction of a contract, and contracts are to be construed to avoid an absurd result." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 593, 538 S.E.2d 15, 22 (Ct. App. 2000).

The trial court's interpretation of Sections 6.01 and 8.17 was correct under these rules of construction. First, the Town drafted the language in Section 6.01 fixing damages to the rent payments "due under this Agreement," and any ambiguity in that section should be resolved against it.[7] The Town could have proposed language in Section 6.01 that expressly disclaimed liability for rent accruing after termination. It did not. Therefore, it should not receive the benefit of any ambiguity created by its own draftsmanship.

Second, the Town's interpretation of the PLA to completely avoid liability despite its multiple breaches would create an unreasonable, unfair, and unjust result. According to the trial court's unchallenged findings of fact, SCDG took the financial risk of leasing property, hiring architects, and agreeing to construct an expensive

[7] If the Town argues that the *contra proferentem* rule of construction does not apply under Section 8.08, that section expressly provides that the rule does not apply with respect to SCDG's role in the preparation of the PLA. (R. pp. 1207-1208 § 8.08.) When the Town revised Section 6.01, it did not revise Section 8.08 to prohibit the application of *contra proferentem* rule to its role in drafting the PLA. Thus, *contra proferentem* applies against the Town to any provisions of the PLA that it drafted, such as the relevant language in Section 6.01.

construction project in reliance on the Town's commitment to pay rent for fifteen years. (R. pp. 598-599, 715-716.) Soon after SCDG began this process, the Town took actions that interfered with the project, thereby causing SCDG to acquire more property to lease at considerable expense to fulfill its contractual commitments under the PLA. (R. pp. 646-647.) SCDG also undertook the effort and cost of redesigning the garage to increase the amount of spaces after the Town rejected SCDG's attempts to find reasonable solutions to the loss of parking spaces caused by the Town's zoning changes. (R. pp. 701, 828.) Nevertheless, the Town refused to reciprocate SCDG's good faith and now advances a contractual interpretation that seeks to immunize itself from its own bad faith.

Third, the Town's interpretation would lead to the absurd result of turning the PLA into a contract of convenience that could be effectively terminated at will by the Town, thereby exposing SCDG to the financial risk of losing a stable tenant without legal recourse. As the trial court found, having the Town as a partner in the garage project provided a significant benefit to SCDG:

> The primary benefit of the proposed license agreement to SCDG was having a stable revenue stream from the rent paid by a municipality with a AAA credit rating, with rent secured by the general obligation of the Town. Because parking revenue is variable and dependent on various factors such as weather and the desirability of neighboring businesses, having a highly-rated tenant in the Town, which would pay fixed rent for a period of 15 years, improved the likelihood that the development would be profitable and could obtain the necessary financing to make the project a reality.

(R. p. 31 ¶ 13.) Given the importance of the Town's financial security and commitment to pay rent, interpreting the PLA in a manner that lets the Town simply walk away from its future rent obligations defies common sense and would create an absurd result. (R. pp. 598-599.)

Yet that is exactly what the Town seeks here. Common sense and fairness, however, dictate that the PLA should not be interpreted to allow the Town to breach its obligations with impunity. By partnering with the Town, SCDG agreed to incur the risk of acquiring a leasehold and constructing a multi-million dollar parking facility in exchange for the good faith and credit of a secure tenant that would pay its rent, rain or shine. And the PLA should be interpreted to effectuate the parties' intent by holding the Town to its commitment to pay rent during the entirety of the rental period.

II. THE TRIAL COURT PROPERLY REJECTED THE TOWN'S DEFENSE THAT SECTION 6.01 IS AN UNENFORCEABLE PENALTY.

A. The Town waived its affirmative defense that Section 6.01 is an unenforceable penalty by failing to plead it.

The Town argues that, if Section 6.01 is a liquidated damages clause as the trial court concluded, it is an unenforceable penalty. Unenforceability based on a penalty is an affirmative defense that must be pled, and a defendant's failure to plead it results in a waiver of the defense. *D&D Leasing*, 305 S.C. at 543, 409 S.E.2d at 796.

In this case, the Town waived its unenforceable penalty defense by failing to plead it as an affirmative defense. (R. pp. 113-135.) Recognizing this omission, the

Town orally moved to amend its pleadings under Rule 15, SCRCP, to assert the defense on the first day of trial just before opening statements. The trial court correctly denied that motion due to the prejudice it would cause SCDG. (R. pp. 565-566.) Therefore, the Town never pleaded the affirmative defense of an unenforceable penalty, and the Court should reject the Town's defense because the Town waived it.[8] *See D&D Leasing*, 305 S.C. at 543, 409 S.E.2d at 796 ("Because [defendant] did not plead unenforceability based on the alleged penalty nature of the termination provision, he waived that defense.")

B. Section 6.01 is not an unenforceable penalty because it fixes damages in an amount less than what SCDG suffered as a result of the Town's breach.

Even if the Court considers the Town's unenforceable penalty defense, the evidence in the record sufficiently demonstrates that Section 6.01 is not an unenforceable penalty. For the liquidated damages to be an unenforceable penalty, the liquidated amount must be "so large that it is plainly disproportionate to any probable damage resulting from [a] breach of contract." *Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984).

The Town's argument that the trial court's award is disproportionate to the probable damages caused by its breach disregards both the law and the facts of this

[8] In its initial brief, the Town does not argue that the trial court abused its discretion in denying its motion to amend. Therefore, it has waived the right to challenge that denial in this appeal in its reply brief. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.")

case. The Town confusingly argues that an award of "fifteen years of the rent due is neither fair nor reasonable," despite the Town's contractual commitment in the PLA to pay rent for that entire period. Thus, the award is fair and reasonable because it is consistent with what the Town promised SCDG when it entered into the PLA. Moreover, this Court's decision in *Bluffton Towne Ctr.* demonstrates that such rent would have been recoverable had there been no liquidated damages clause.

Next, the Town argues that SCDG suffered no damages because the garage has received rental revenues from transient parkers since the garage was completed. This argument ignores that the PLA expressly grants SCDG the right to charge a reasonable rate for parking in the garage's public spaces. (R. p. 1204 § 3.02(c).) Thus, SCDG would have received the parking revenues regardless of the Town's breach, and those fees could not be used to offset the damages that SCDG could recover in the absence of the liquidated damages clause in Section 6.01.

The Town's argument also disregards the fact that SCDG was forced to relinquish its full ownership in the project as a result of the financial implications of the Town's repudiation of the PLA. As a result, SCDG only has a 15% membership interest in the joint venture that now owns and operates the garage. (R. pp. 716, 828.) So, at best, SCDG has only received a minor, indirect benefit from any net revenues generated through garage parking.

And most problematically, the Town's argument assumes that all parking revenues are pure profit without accounting for the expenses associated with constructing, owning, operating, insuring, maintaining, and paying ground rent for

the garage. Instead of accounting for expenses, the Town simplistically claims that SCDG has received total parking revenue of more than three times the Town's annual rent to imply that SCDG has received a windfall via the trial court's award.

In reality, no windfall occurred because SCDG suffered damages far in excess of what was awarded by the trial court, as confirmed by the evidence presented at trial. (R. pp. 644-647, 701, 716, 828.) For example, if there had been no liquidated damages clause, SCDG could have recovered all actual and consequential damages, including the following:

- The rental payments awarded by the trial court in the amount of $2,604,316; *See Bluffton Towne Ctr.*, 412 S.C. at 568, 772 S.E.2d at 890 (ruling that landlord was entitled to damages measured by amount it would have received as rent for remainder of rental term had there been no default);

- In excess of $1 million in costs associated with renegotiating the leases and acquiring more property to accommodate the results of the Town's elimination of the 5' setback and creation of an activity zone on Mill Street when it amended its zoning ordinance (R. pp. 644-647, 701.);

- Lost parking revenue in perpetuity that SCDG could have obtained from the spaces eliminated as a result of the Town's adoption of the zoning amendments that reduced the number of spaces (R. p. 701.);

- Additional design fees to conform the project to the Town's zoning amendments (R. pp. 701, 828.); and

- The financial loss associated with SCDG's relinquishment of 85% of the ownership in the project after SCDG was forced to abandoned its sole ownership in the project and create a joint venture with an equity investor as a result of the Town's repudiation of the PLA and refusal to pay rent. (R. pp. 716, 828.)

Put simply, Section 6.01 saved the Town from a judgment of millions of dollars more than what SCDG recovered in this case.

Therefore, if the Court finds that the Town did not waive its unenforceable penalty defense, it should nevertheless affirm the trial court's award under Rule 220(c), SCACR, because the evidence demonstrates that the award was not so large as to be plainly disproportionate to the actual and compensatory damages caused by the Town's breach.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION TO THE PREJUDICE OF THE TOWN IN DENYING THE MOTION TO COMPEL THE PRODUCTION OF FINANCIAL RECORDS OF A THIRD-PARTY.

To excuse its failure to challenge SCDG's evidence of damages of trial, the Town attempts to shift blame to the trial court's denial of its motion to compel the production of 101 Coleman Partners' parking and financial records. According to the Town, the trial court's ruling on this motion deprived the Town of relevant evidence that it needed to rebut SCDG's damages, including issues related to mitigation and rent reduction. However, not only was the trial court's ruling legally correct, the Town's argument is based on a mischaracterization of the relevant facts that is designed to mask its errant trial strategy. In fact, the Town possessed 101 Coleman Partners' parking revenue reports and financial statements but failed to present or proffer that evidence at trial. As a result, it has failed to preserve its argument that it was prejudiced by the trial court's discovery ruling and any such error in the ruling was harmless.

A. The trial court correctly concluded that 101 Coleman Partners' financial records were not relevant.

The trial court property denied the motion to compel because the documents sought were not relevant. A trial court's determination of relevance is largely within its discretion, and its determination will not be disturbed on appeal unless there is an abuse of discretion amounting to an error of law that prejudice's the appellant. *Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 843 (Ct. App. 2009). Similarly, the "rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Evening Post Publ. Co. v. Berkeley Cty. Sch. Dist.*, 392 S.C. 76, 85, 708 S.E.2d 745, 750 (2011).

As discussed previously, the trial court correctly concluded that the parties agreed to a liquidated damages provision fixing damages to the rental payments due under the PLA. The trial court then ruled that evidence sought by the Town for mitigation purposes was not relevant because a non-breaching party is not required to mitigate when the parties have agreed to liquidate damages. In support of this ruling, the trial court relied on numerous decisions from jurisdictions across the country applying this principle. (R. p. 21.) (*citing NPS, LLC v. Minihane*, 451 Mass. 417, 423, 886 N.E.2d 670, 675 (2008) ("When parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the 'peace of mind and certainty of result' afforded by a liquidated damages clause."); *Xerox Corp. v. RP Digital Servs.*, 232 F. Supp. 3d 321, 325 (W.D.N.Y. 2017) ("[W]here, as here, a contract contains a valid liquidated damages

provision, 'mitigation of damages is not relevant.'"); *Barrie Sch. v. Patch*, 401 Md. 497, 513-14, 933 A.2d 382, 392 (2007) (holding that a court need not consider mitigation when the parties have agreed to liquidated damages); *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380, 613 N.E.2d 183, 190 (1993) (stating that mitigation is not proper where there is a valid liquidated damages clause)).

The trial court's ruling on this point was correct under general contract law.

> If a liquidated damages clause is valid, the nonbreaching party does not have a duty to mitigate damages following the breach. The issue of mitigation of damages is not relevant, and the doctrine will not be applied to defeat the plain terms of an otherwise enforceable agreement which provides for liquidated damages.

22 Am. Jur. 2d *Damages* § 541. Therefore, any information sought by the Town to argue that SCDG's damages should be reduced by mitigation or rent reduction would have been irrelevant, and the trial court correctly denied the motion to compel.

Also, as previously discussed, the trial court correctly ruled that the rent reduction clause in Section 1.07(b) did not survive the termination of the PLA. As a result, the Town could not have presented any information related to the financial performance of the parking garage during the PLA's rent period to reduce SCDG's damages under Section 1.07(b). That information was, therefore, irrelevant, as the trial court found.

Yet even if the trial court's conclusions on liquidated damages and rent reduction were in error, the trial court still did not abuse its discretion in denying the motion to compel because it sought the financial and operational information of a third-party – not SCDG. According to the trial court:

> [T]he documents sought are not relevant because they pertain to the operations of 101 Coleman Partners, which is a separate and distinct entity from SCDG. SCDG has only a 15% interest in 101 Coleman Partners, and 101 Coleman Partners has no interest in the parking license agreement or this litigation. As a result, 101 Coleman Partners' activities and financial information have no relationship to the parking license agreement or this litigation.

(R. p. 22.)

The trial court's ruling implicitly acknowledged that the revenues, expenses, and net profits of the parking garage are realized and incurred by 101 Coleman Partners based on operational decisions made by 101 Coleman Partners. These decisions include setting parking fees; negotiating ground rent; determining the hours of operation; allocating spaces for office parking; budgeting for maintenance costs and reserves; procuring insurance; selecting the parking gates, ticket and payment equipment, and other infrastructure; installing security systems; making repair decisions; and contracting for management services. Moreover, 101 Coleman Partners makes these decisions based on uncertain and variable parking demand projections without the certainty of $185,000 in annual rent under the PLA; whereas, SCDG would have made operational and financial decisions knowing that the Town was obligated to pay rent under the PLA under any conditions that could affect parking demand. Simply put, 101 Coleman Partners operates the parking garage differently than SCDG would have operated it had the Town not repudiated the PLA. Thus, the trial court did not abuse its discretion in determining that 101 Coleman Partners' financial performance and operations of the garage are irrelevant to any

speculative estimates of whether SCDG's revenues and expenses would have resulted in rent reduction under Section 1.07(b).

B. Despite the Town's mischaracterization of the procedural history of this case, the Town was not prejudiced by the trial court's ruling on the motion to compel because the Town possessed 101 Coleman Partners' parking and financial records but chose not to introduce them at trial.

The trial court's judgment should not be reversed because the Town was not prejudiced by the trial court's denial of the motion to compel, and any error was harmless.[9] The Town did not present during trial any evidence relating to 101 Coleman Partners' parking revenues and financial performance, even though this information was in the Town's possession. The Town does not disclose this fact to the Court, but instead mischaracterizes the relevant procedural history and omits material facts to argue that it was deprived of an opportunity to obtain and present 101 Coleman Partners' financial information. The record must be corrected.

In its initial brief, the Town omits that, prior to its motion to compel, it requested documents describing or identifying the amount of revenue received for the use of parking spaces and all financial and accounting documents related to the parking deck. After the trial court entered a confidentiality order, SCDG produced

[9] Because the Town never attempted to cross-examine SCDG's damages witness or attempt to introduce 101 Coleman Partners' financial and parking records during trial, the trial court never made any final rulings on the Town's mitigation and rent reduction arguments. Therefore, nothing appears in the record about the Town's possession of these records. As a result, SCDG presents the arguments in this section relating to the Town's possession of 101 Coleman Partners' records as an additional sustaining ground under Rule 220(c), SCACR. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (explaining that respondent may raise an additional sustaining ground that was not presented to the lower court).

in response to these requests over 300 pages of documents relating to the parking garage's operations and performance, including 101 Coleman Partners' parking revenue reports and financial statements showing its revenues and expenses. So, although the Town complains that the trial court deprived it of documents relevant to issues of mitigation and rent reduction, the Town, in fact, had those documents in its possession. The Town just failed to present them at trial.

Next, the Town claims that Tyler Flesch, one of SCDG's principals, refused to answer questions related to the garage's net operating profit and mitigation requirements under the PLA during a deposition taken on August 8, 2019. However, the Town neglects to disclose the fact the deposition in question was conducted pursuant to Rule 30(b)(6), and the only topic noticed by the Town was SCDG's calculation of damages that had been previously disclosed. (R. pp. 419-420.) Significantly, this initial calculation was the same as the calculation presented at trial except for a change to the discount rate and adjustments based on the actual trial date, which affected the prejudgment interest and present value calculations. (R. pp. 309-334.) SCDG's initial damages calculation did not include any analysis of purported mitigation requirements or the garage's net operating profit. (*Id.*) Thus, mitigation and 101 Coleman Partners' were not proper topics of the deposition.

Nevertheless, the Town attempted to question Mr. Flesch almost exclusively on topics beyond those identified in the notice of deposition. (*Id.*) Although Mr. Flesch was not prepared to answer questions on those topics because they had not been previously identified, he did not refuse to answer any questions posed to him.

(*Id.*) He answered them to the best of his ability given his lack of preparation for those questions, and if the Town was unsatisfied with his answers, it had no one to blame but itself. In any case, any suggestion that Mr. Flesch was evasive or non-responsive is belied by the Town's own failure to properly identify the topics it wished to explore during that deposition.

Also, the Town seems to suggest that it first learned of the existence of 101 Coleman Partners during the deposition on August 8, 2019. However, SCDG revealed in its complaint filed in October 2017 that it was forced to partner with an equity investor to create a joint venture to complete the project. (R. p. 107 ¶ 25.) Later, in November 2018, SCDG identified its joint venture partner in its interrogatory responses and produced related documents. (R. pp. 1493-1494, No. 16.) Then, after the entry of the confidentiality order, SCDG produced 101 Coleman Partners' financial statements and parking records. So, any suggestion that the identity of Coleman Partners was somehow hidden from the Town until nearly two years after the litigation commenced is false.

Similarly, the Town falsely describes Mr. Flesch's deposition testimony by claiming that he testified that SCDG "assigned its ownership and management interests the day it filed suit against the Town to a new entity, 101 Coleman Partners, LLC." The Town provides no citation for this alleged testimony, and in fact, it does not exist.

Instead, documents produced in discovery and submitted to the trial court in response to the motion to compel reveal that 101 Coleman Partners was formed in

December 2015, nearly two years before the lawsuit was filed. (R. pp. 384-388.) It registered to do business in in South Carolina in February 2016. SCDG and its joint venture partner entered into 101 Coleman Partners' operating agreement in March 2016, and shortly thereafter, 101 Coleman Partners obtained a loan to partially finance the project. (R. pp. 384-388, 405-409.) Also, the Town issued a business license to 101 Coleman Partners to operate the garage and office building in May 2017. (R. p. 411.) Furthermore, prior to commencing this action, SCDG was required to indemnify 101 Coleman Partners and the other member from any claims or losses arising from this lawsuit. (R. pp. 413-417.) Therefore, the Town's claim that SCDG assigned its interest in the parking garage to 101 Coleman Partners in connection to the litigation is demonstrably false.

Last, the Town falsely claims that SCDG produced "no documents in response to those requests for production" sought in the motion to compel. However, SCDG produced documents in its possession and identified previously produced documents that were responsive to the requests, including documents related to 101 Coleman Partners. (R. pp. 405-409.) SCDG did not have in its possession certain documents requested by the Town, but the only request to which SCDG objected and refused to provide documents was the request for SCDG's tax returns. (*Id.*)

Overall, the Town grossly mischaracterizes the facts to create the perception that it was deprived of information needed to dispute SCDG's damages at trial. In reality, SCDG produced detailed parking revenue reports and 101 Coleman Partners' financial statements, as well as many other documents related to 101 Coleman

Partners, which the Town could have used at trial for mitigation or rent reduction purposes. It is simply not the trial court's fault that the Town elected not to use them.

Because the Town failed to introduce or proffer 101 Coleman Partners' parking and financial records at trial, any error in the trial court's motion to compel was harmless. "Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Judy*, 384 S.C. at 646, 682 S.E.2d at 843. Here, the trial court's denial of the motion to compel did not affect the result of the trial because the Town was not deprived of the financial information needed to argue that SCDG's damages should have been reduced because of a failure to mitigate or under the rent reduction clause. *See U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (ruling denial of motion to compel was harmless because appellant was aware of information sought in the motion).

While the Town may argue that any effort to introduce such evidence at trial would have been futile given the trial court's prior ruling on the motion to compel, that ruling was not final with respect to admissibility of evidence. *See S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 84, 431 S.E.2d 625, 627 fn. 2(Ct. App. 1993) (noting that ruling on motion *in limine* is not the final ruling on admissibility of evidence). The Town was obligated to present that evidence, or at least proffer it, to give the trial court an opportunity to change its ruling and preserve the issue for appeal. *See Ellis by Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996) (ruling that appellant's failure to proffer excluded evidence at trial did not

preserve issue on appeal). Had the Town truly believed that 101 Coleman Partners' financial records would have demonstrated that SCDG's damages calculation should have been reduced under the rent reduction clause, it surely would have attempted to present that information at trial to preserve the issue on appeal. But not only did the Town fail to do so, its neglected to even cross-examine SCDG's witnesses on the fact that the damages calculation did not account for the possibility of rent reduction. Thus, the Town should not be permitted to overturn the trial court's judgment now.

CONCLUSION

Based on the foregoing discussion and analysis, the trial court correctly awarded judgment in SCDG's favor in the amount of $2,604,316, plus attorneys' fees and costs, and SCDG respectfully requests that the judgment be affirmed. If the Court reverses the judgment and remands the case to the trial court, any new trial should be limited to issues of damages alone.[10]

[10] The Town asserts that, if the court grants a new trial on its appeal, the new trial must include both issues of liability and damages under S.C. Code Ann. § 15-33-125. However, this statute is not applicable because it applies only to a new trial granted to the plaintiff. In this case, SCDG is not the appellant and is not seeking a new trial. Because the Town has only challenged the trial court's ruling on damages, any new trial should be limited to damages.

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September 29, 2021
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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.

CERTIFICATE OF RESPONDENT'S COUNSEL

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

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