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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2022-001224
[Lower Court Case No. 2016-CP-10-01143]

Palmetto Construction Group, LLC — Respondent

v.

Restoration Specialists, LLC,
Reuben Mark Ward, and
Lynnette Pennington Ward — Appellants

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in failing to lift the entry of default and set aside the default judgment under Rules 55(c) and Rule 60(b), SCRCP, respectively?

II. Did the lower court err in holding that the Appellants waived their right to arbitration?

III. Did the lower court err in failing to dismiss this action for lack of a justiciable controversy and subject matter jurisdiction pursuant to SCRCP 12(b)(1)?

IV. Did the lower court err in denying Appellants Motion to Exclude and Strike?

V. Did the lower court err in entering default judgment and awarding joint and several damages against all Appellants in the amount of Two Million Three Hundred Thirty Eight Thousand Nine Hundred Fifty Eight ($2, 338, 958.64) Dollars?

STATEMENT OF THE CASE

This action arises out of a construction project in Augusta, Georgia (the "Project"). (*Summons and Complaint, with Exhibits*). On March 29, 2012, the Appellant, Restoration Specialists, LLC ("Appellant Restoration) was awarded a contract to construct the Charlie Norwood VAMC Parking Garage in Augusta, Georgia. (*Memorandum in Support of Defendant's Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c))*. The Respondent and Appellant Restoration Specialists, LLC ("Appellant Restoration") entered into a Subcontract Agreement in connection with the Project. (*Id.*). The subcontract agreement contains mandatory mediation/arbitration provisions (Sections 6.1 & 6.2) requiring the submission of any claim arising out of or related to the agreement to mediation/arbitration.

(*Id.).* Also, Section 6.3.4 of the subcontract agreement provides that either party, at its sole discretion, may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. (*Id.*).

Respondent filed this lawsuit on March 7, 2016, alleging a breach of the Subcontract Agreement and additional claims relating to the Project against the Appellants, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Appellants"). (*Id.*). Simultaneously with filing the lawsuit, Respondent filed a Motion to Stay and to Compel on March 7, 2016. (*Plaintiff's Motion to Stay and Compel*). The basis of Respondent's Motion to Stay and to Compel was that the Subcontract Agreement contained mandatory mediation/arbitration provisions requiring the Court to stay the litigation and the parties to mediate in Georgia or other agreed upon location and, if necessary, arbitrate all claims contained in Respondent's lawsuit. *(Id.)* Respondent simultaneously served all Appellants with both the Complaint and Motion to Stay and to Compel on March 14, 2016. (*Affidavits of Service*).

Respondent filed a Motion to Refer to the Master in Equity and for Entry of Default on April 18, 2016. (*Motion to Refer to the Master In Equity and for Entry of Default*). The Circuit Court entered default against the Appellants on April 21, 2016. (*Order of April 20, 2016*).

On the evening of June 2, 2016, the Appellant Mark Ward was served with a Notice of Hearing scheduling the default damages hearing for June 6, 2016. (*Affidavit I of Reuben Mark Ward, dated June 3, 2016*) ("*Ward Affidavit I")*. The Appellants were unaware of the default status of the case and the scheduling of the damages hearing until service of the hearing Notice on June 2, 2016. (*Affidavit II of Reuben Mark Ward, dated June 3, 2016*) ("*Ward Affidavit II)*. Upon service of this Notice of Hearing, the Appellants immediately retained legal counsel on

June 3, 2016. (*Id.*). Appellants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016, citing the mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of their grounds for relief. (*Defendants' Notice of Motion and Motion for Continuance and Protection Pursuant to SCRCP 6(d) and 40(j) and Defendants' Notice of Motion and Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c)*).

At the hearing on June 6, 2016, the Master in Equity ("Master") granted Appellants' Motion for Continuance of the damages hearing and held the Motion to Set Aside Entry of Default in abeyance. (*Transcript of Proceedings Held June 6, 2016)*. The Master then directed the Appellants to provide financial information relative to the Project to see what could be resolved between the parties and scheduled the matter to reconvene for a status conference on July 14, 2016. (*Id.*). Per the Master's direction, the Appellants provided certain relevant documents and basic written discovery responses to Respondent.

On July 11, 2016, the Appellants filed a formal Motion to Stay and to Compel on the basis of the mandatory contractual mediation/arbitration provisions. (*Defendants' Notice of Motion and Motion to Stay and to Compel Pursuant to SCRCP 12(b)(2) and Applicable Case Law*). In addition, the Appellants joined in and consented to Respondent's Motion to Stay and to Compel, rendering that motion a joint Motion to Stay and to Compel mandatory mediation/arbitration ("Joint Motion"). (*Id.*). As such, Appellants' singular and joint Motions to Stay and Compel mandatory mediation/arbitration were pending before the Master at this time.[1]

The parties reconvened before the Master on July 14, 2016. (*Transcript of Proceedings*

[1] While Respondent asserts that it "set aside" or "withdrew" its Motion to Stay and Compel, the record is devoid of evidence substantiating Respondent's assertion.

Held July 14, 2016). Upon completion of the reconvened hearing, the Master issued a formal order dated July 14, 2016. (*Order of July 14, 2016*). The Master's formal order: (a): Denied Appellants' Motion to Lift Entry of Default for lack of good cause; (b): Denied Appellants' Motion to Stay and Compel mandatory mediation/arbitration on the basis of default; and (c): Set a damages hearing for October 4, 2016. *(Id.)*.

The Appellants filed a timely Motion to Reconsider and to Alter and Amend the Master's July 14, 2016 order pursuant to SCRCP 59(e) and applicable case law on July 27, 2016 ("Appellants" Rule 59(e) Motion"). (*Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend Pursuant to SCRCP 59(e) and Applicable Case Law*). The Master scheduled the hearing on Appellants' Rule 59(e) Motion to be held on October 11, 2016, seven days after the scheduled damages hearing on October 4, 2016. (*Charleston County Roster Details – Master's Docket for October 11, 2016)*. The Appellants requested the court to hear their Rule 59(e) motion prior to the damages hearing, which request was denied. (*"Attorney Ariail Letter to Judge Scarborough of September 7, 2016"; emails with Cover Letter filed with the Court on September 22, 2016).*

While the Master did proceed with a hearing on October 4, 2016, he did not conduct a damages hearing nor issue a ruling on Appellants' Rule 59(e) motion at that time. (*Transcript of Proceedings Held October 4, 2016*). Instead, on October 28, 2016, the Master issued his final order ruling on Appellants' Rule 59(e) Motion. (*Order of October 28, 2016*). The Master's Order: (a): Denied Defendants' Motion to Amend on the basis that Defendants did not show good cause to lift the default, and (b): Denied Defendants' Motion to Stay and Compel filed July 11, 2016 on the basis that the affirmative defense of arbitration had been waived and therefore the motion was not properly made. (*Id.*).

Thereafter, the Appellants appealed the Master's orders dated July 14, 2016 and

October 28, 2016 to the South Carolina Court of Appeals and, upon Writ of Certiorari, to the South Carolina Supreme Court. (*Notice of Appeal; Petition for Writ of Certiorari*). Both appellate courts dismissed Appellants' appeal as interlocutory. (*Opinion No. 5661; Opinion No. 28010)*.

On March 22, 2019, prior to remittitur, Articles of Termination were filed on behalf of Respondent with the South Carolina Secretary of State. (*Articles of Termination*).

The Supreme Court of South Carolina remitted the case to the lower court on April 20, 2021. (*Remittitur*). Therefore, on April 21, 2021, Appellants moved the lower court to dismiss this action, pursuant to SCRCP 12(b)(1), on the grounds that Respondent had terminated its legal existence and, thus, the lower court lacked subject matter jurisdiction over the action because it no longer presented a justiciable controversy between the parties. (*Defendant's Notice of Motion and Motion to Dismiss Pursuant to SCRCP 12(b)(1)*).

Upon remittitur, the Master held a default damages hearing, including a hearing on Defendants' Notice of Motion and Motion to Dismiss Pursuant to SCRCP 12(b)(1) on January 31, 2022. (*Transcript of Proceedings Held January 31, 2022*). Thereafter, on February 28, 2022, the Master issued his Order Denying Defendants' Motion to Dismiss and Entering Default Judgment ("Order and Judgment"), a Form 4 Order denying Defendants' Motion to Exclude and Strike and a Form 4 Order entering default judgment. (*Order Denying Defendants' Motion to Dismiss and Entering Default Judgment; Form 4 Order; Form 4 Order)*. The Master's Order and Judgment entered a joint and several judgment against all Appellants in the amount of Two Million Three Hundred Thirty-Eight Thousand Nine Hundred Fifty Eight and 64/100ths ($2,338,958.64) Dollars, with instructions to the Charleston County Clerk of Court to enroll the judgment in the judgment index. *(Id.).*

On March 10, 2022, the Appellants timely filed: (1) a Motion to Reconsider and to

Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike and 2) a Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment ("Appellants' Motions to Reconsider). (*Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike; Defendants' Notice of Motion and Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment*). On August 1, 2022, the Master issued his Form 4 Order denying, *inter alia*, Appellants' Motions to Reconsider. (*Form 4 Order).*

The Appellants timely filed the instant appeal on August 31, 2022 appealing the Master's orders cited therein. (*Notice of Appeal*).

ARGUMENTS

I. THE LOWER COURT ERRED IN FAILING TO LIFT THE ENTRY OF DEFAULT AND/OR SETTING ASIDE THE DEFAULT JUDGMENT.

(A): Appellate Standard of Review.

The trial court's decision concerning whether to set aside an entry of default or a default judgment pursuant to Rules 55 and 60(b), SCRCP, lies within the sound discretion of the trial judge, and his decision will not be disturbed on appeal absent a clear abuse of discretion. *Richardson v. P.V., Inc.,* 383 S.C. 610, 682 S.E.2d 263 (2009); *Harbor Island Owners' Ass'n v. Preferred Island Props.,* 369 S.C. 540, 633 S.E.2d 497, 499 (2006); *Roberson v. S. Fin. Of S.C., Inc.,* 365 S.C. 6, 615 S.E.2d 112 (2005); *Stark Truss Co. v. Super. Constr. Corp.,* 360 S.C. 503, 602 S.E. 2d 99 (Ct. App. 2004). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v.*

Gaffney, 297 S.C. 160, 162-62, 375 S.E.2d 321, 322-23 (Ct. App. 1988). A lower court has abused its discretion when its ruling is either controlled by an error of law or based on a factual conclusion lacking evidentiary support. *See, e.g., Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013); *Fairchild v. S.C. Dep't of Transp.,* 398 S.C. 90, 727 S.E.2d 407 (2012); *Ex parte Gregory,* 378 S.C. 430, 663 S.E.2d 46 (2008); *State v. Sweet,* 374 S.C. 1, 647 S.E.2d 202 (2007); *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 487 S.E.2d 596 (1997); *State v. Adkins,* 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003). More specifically,

> An abuse of discretion occurs when the trial court's ruling based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 634 S. E. 2d 653 (2006); *see also Ex parte Capital U-Drive-It, Inc.,* 369 S.C. 1, 630 S.E.2d 464 (2006).

(B) : Rule 55(c), SCRCP.

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. *White Oak Manor, Inc. v. Lexington Ins. Co.,* 407 S.C. 1, 753 S.E.2d 537 (2014). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted." *White Oak Manor*, 407 S.C. at ___, 753 S.E.2d at 542. In applying this standard, Rule 55(c) "is liberally construed to promote justice and

dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.,* 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995).

(C): Rule 60(b)(1), SCRCP

Under Rule 60(b)(1), a judgment may be set aside due to mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), SCRCP. In determining whether a default judgment should be set aside for any of these reasons, the court must consider the following factors: (1) promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the degree of prejudice to the other party. *Rouvet v. Rouvet,* 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010).

(D): Applying the standards of Rule 55(c) and Rule 60(b)(1) To The Facts Of This Case Establishes That Good Cause, Mistake, Inadvertence, and/or Excusable Neglect Warrants Lifting the Entry of Default and/or Setting Aside the Default Judgment in this action.

(1): Appellants Provided a Reasonable/Satisfactory Explanation for Default and Vacation of the Default Entry Will Serve the Interests of Justice.

In the present case, the Respondent served a Summons and Complaint, together with a Motion to Stay and Compel Arbitration on Appellants on March 7, 2016. Respondent's Motion to Stay and Compel expressly requested an **"order of this court be made directing that the claims asserted by [Respondent] against the [Appellants] that arise out of the parties dealings be stayed, that mediation, and, if necessary, arbitration proceed in the manner provided for in [the Subcontract Agreement…]" (emphasis added).** The Appellants' failed to file a timely response to the Complaint acting under the omission was unintentional and the result of Appellants' acting under the good faith belief that the claims in related to the ongoing arrangements and direct discussions with the surety, The Hanover

Insurance Company ("Hanover"), seeking to address subcontractor and payment bond claims ("subcontract claims"). Moreover, Respondent's contemporaneous service of both its Complaint coupled with its Motion to Stay and Compel gave reinforced Appellant's impression that the lawsuit would be stayed by court order and that Respondent's claims would be resolved outside of litigation by way of the contractually agreed upon alternative dispute resolution procedures and ongoing discussions with Hanover.

The Appellants are not attorneys well versed in the rules of civil procedure. Under the above circumstances, the Appellants believed that the subcontract claims asserted in Respondent's lawsuit were commensurate with those involved in their ongoing arrangements and discussions with Hanover. Indeed, the subcontract claims to Hanover were the same as those alleged in the Complaint and the damages claims associated therewith were tried in the default hearing.

Appellants' belief was reasonable and their inadvertent mistake in omitting to file a formal answer to Respondent's Complaint was innocent, unintentional and carried no intention of gaining an unfair advantage over the Respondent or delaying legal proceedings. Upon learning of the default damages hearing, Appellants immediately retained legal counsel to appear and respond on their behalf in this matter.

Furthermore, the law does not favor defaults. As such, Rule 55(c) is liberally construed to promote justice and dispose of cases on the merits. *Dixon*, 320 S.C. at ___, 463 S.E.2d at 638. The Appellants short delay in appearing in and responding to Respondent's lawsuit, constituted no prejudice to the Respondent. The Appellants asserted various defenses to Respondent's lawsuit, which if considered by the Master and prevailed upon at a full hearing on the merits, would have rendered a verdict contrary to the default judgment entered by the Master.

For these reasons, and in light of the Appellants' good faith and reasonable explanation for the default, vacating the entry of default and/or setting aside the default judgment would serve the interests of justice and promote disposition of the case on the merits.

(2): Appellants Promptly and Timely Filed Their Motion Seeking Relief From The Entry of Default As Well As The Default Judgment.

The Respondent filed a Motion to Refer to the Master In Equity and for Entry of Default on April 18, 2016. Thereafter, the Court entered default against the Appellants on April 21, 2016. The Appellants have no record and no recollection of receiving: (1) the Motion to Refer to the Master in Equity and for Entry of Default or (2) the Order for Entry of Default and Referral to the Master in Equity. (*Ward Affidavit 2).* The record does not contain proof of service of either of these documents upon the Appellants.

On June 2, 2016 at 6:30 pm, Appellant Mark Ward was served with the Notice of the default damages hearing. (*Ward Affidavit I*). The Notice scheduled the default damages hearing for the morning of June 6, 2016. The Appellants retained legal counsel on June 3, 2016, the very next day after being served with the default damages hearing Notice the night before. (*Ward Affidavit* II). The Appellants' counsel immediately appeared on behalf of Defendants and filed a Motion to Set Aside Entry of Default on the afternoon of June 3, 2016. (*Defendants' Notice of Motion and Motion to Set Aside Default*).

In short, the Appellants took immediate action upon learning of the default status and receipt of notice of the damages hearing. Specifically, they retained defense counsel within 24 hours of becoming aware of the default status and damages hearing followed by the immediate filing of the Motion to Set Aside Entry of Default. Likewise, Appellants Rule 60(b)(1) motion to set aside the default judgment was timely under Rule 60, SCRCP. Thus, the Defendants satisfied the timely motion filing requirements under both Rule 55(c), and 60(b)(1), SCRCP.

(3). <u>The Appellants have Multiple Meritorious Defenses to the Respondent's Lawsuit.</u>

The Appellants are entitled to mandatory mediation/arbitration of the claims in Respondent's lawsuit upon the grounds set forth in this *Initial Brief of Appellants, Arguments Section II,* below. This alone constitutes a meritorious defense to Respondent's lawsuit, which lawsuit Respondent expressly requested the court to stay in Plaintiff's Motion to Stay and Compel mediation/arbitration upon commencement of this action.

In addition, the Appellants have multiple substantive defenses to Respondent's claims including, but not limited to: (a) the full payment and overpayment of Respondent under the subcontract; (b) the lack of any subcontract provision for profit sharing in either the Teaming Agreement, the subcontract or other substantiated contractual agreement; (c) the Respondent's waiver of indirect, special or consequential losses in contract, tort or otherwise under the Teaming Agreement; (d) the Respondent's waiver of rights to legal and equitable indemnity under the indemnity agreement; (e) the bar to Respondent's claim for equitable indemnity due to the failure of payment to the surety; (f) all additional defenses asserted by Appellants in support of its efforts to lift the entry of default and set aside the default judgment, including those contained in Appellants' legal memoranda and asserted in the damages hearing and post-trial motions. (*Memorandum in Support of Defendant's Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c); Notice of Motion to and Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment; Transcript of Proceedings Held January 31, 2022).*

The subcontract, Teaming Agreement and Indemnity Agreement on their face establish prima facie evidence of a number of these defenses. In addition, various documents designated and attached as "exhibits" in Respondent's two Notices of Filing Trial Exhibits ("Notices") which Notices were filed with the Charleston County Clerk of Court on February 1, 2022 and

admitted into evidence over Appellants' evidentiary objections at the default damages hearing and post-trial Motion to Exclude and Strike, as well as certain testimony related to these documents at the default damages hearing, provide further evidentiary support for these defenses and constitute a prima facie showing of Appellants' multiple meritorious defenses to Respondent's Complaint. (*Id.*).

(4): <u>The Respondent Would Not Have Suffered Prejudice if The Entry of Default had been Set Aside, Nor Did The Defendant In Fact Suffer Any Actual Prejudice Prior To Or As A Result Of Appellants' Assertion Of Their Rights To Arbitration.</u>

The Appellants responded to Respondent's lawsuit with the retention of counsel and filing of their Motion to Set Aside Entry of Default on June 3, 2016. The Appellants took these actions within 51 days of the date on which Appellants' answer to the Complaint was originally due, within 43 days of the entry of default, and within 24 hours of first learning of the default status and damages hearing. The Appellant's delay was short and created no prejudice to the Respondent's ability to litigate the very case Respondent expressly moved the Court to stay to allow the parties to engage in their contractually mandated alternative dispute resolutions of mediation and/or arbitration. In fact, the Appellants formally moved and expressly joined in Respondent's motion to stay and compel mediation/arbitration barely over a month after first becoming aware of the default status and pending damages hearing and the brief delay caused no tangible harm or actual prejudice to Respondent such as the loss of evidence, increased difficulties of discovery, opportunity for fraud or collusion, undue expense or damage to Respondent's legal position. Even to date, the Respondent has failed to prove actual prejudice during the course of this litigation. *See Initial Brief of Appellants, Arguments, Section II (E)(3.).*

In fact, the corollary to the lack of prejudice to the Respondent is the extreme prejudice the Appellants suffered by the lower court's abuse of discretion in failing to lift the entry of

default for good cause shown and proceeding to the damages hearing. This initial prejudice was compounded by the lower court's further abuse of discretion in rendering and subsequently upholding a default judgment controlled by errors of law and based upon factual conclusions lacking evidentiary support, all of which resulted in a joint and several judgment against all Appellants in excess of Two Million ($2,000.000) Dollars. The Master's actions in failing to lift the entry of default for good cause or setting aside the default judgment for mistake, inadvertence, surprise or excusable neglect constitute reversible error.

II. BECAUSE THE CONTRACT CONTAINS MANDATORY MEDIATION/ARBITRATION PROVISIONS AND THE APPELLANTS HAVE NOT DEFAULTED UPON NOR WAIVED THEIR RIGHTS TO MEDIATION/ARBITRATION, THE LOWER COURT ERRED IN FAILING TO STAY THIS ACTION AND COMPEL MEDIATION/ARBITRATION.

(A): Appellate Standard of Review.

The denial of a motion to compel arbitration, based on a finding of waiver, is a legal conclusion subject to *de novo* review on appeal. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E. 2d 868 (Ct. App. 2013); *MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E. 2d 639, 641 (Ct. App. 2003).

(B): South Carolina and Federal Arbitration Jurisprudence Ensure The Enforceability Of Private Agreements To Arbitrate.

The right to arbitration is a substantial right. The policies underpinning the arbitration jurisprudence of South Carolina and the federal arbitration jurisprudence under the Federal Arbitration Act are for the purpose of ensuring the enforceability of private agreements to arbitrate.

In the present case, the parties' contract is clearly an integrated and executed written private agreement whereby Respondent and the Appellants agreed to resolve their disputes through mandatory mediation, and if necessary, through arbitration. (A. pp. 0187-0201); *see also Arguments Section II (C)* below. Pursuant to South Carolina Code Annotated §15-48-10,

such an agreement is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." South Carolina Code Ann. § 15-48-10. Likewise, under federal law such an agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Further, South Carolina and federal courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("[A] as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense…*") (emphasis added).

Given the above-cited precedent, and the fact that the parties entered into a written private agreement to arbitrate all disputes arising out of or related to the contract, any doubt concerning the enforceability of arbitration to the parties' disputes should be resolved in favor of arbitration. *Id.*

(C) : All Appellants Are Entitled to Mediation/Arbitration Under the Alternative Dispute Resolution Provisions of the Contract.

The Respondent's Complaint and the causes of action asserted against all Appellants, including the individual Appellants, Reuben Mark Ward and Lynnette Pennington Ward ("Ward Appellants"), allegedly arise out of or are related to the contract containing the arbitration provisions. These provisions require all claims arising out of or related to the contract to be mediated, and if not resolved by mediation, to be resolved by binding arbitration. The Respondent expressly acknowledged the validity and enforceability of the arbitration

provisions in its Motion to Stay and Compel at the commencement of this action and Appellants expressly joined in Respondent's demand for arbitration. Accordingly, and based on the authorities below and remaining authorities cited in the *Initial Brief of Appellants,* all Appellants have standing to enforce and participate in mediation/arbitration of Respondent's claims pursuant to: (a): the express terms of the contract; (b): the joinder of the Ward Appellants to the arbitration pursuant to their Motion to Stay and Compel Pursuant to SCRCP 12(b)(1) and Applicable Law; and (c): the principles of equitable estoppel. *See U.S. ex rel. Coast Roofing v. P. Browne & Assoc.,* 585 F. Supp 2d. 708 (D.S.C. 2007); *Am. Bankers Ins. Group, Inc. v. Long,* 453 F.3d 623 (4th Cir. 2006); *Choctaw Generation Ltd. P'ship v. American Home Assur. Co.,* 271 F.3d 403 (2d Cir. 2001); *Thomson-CSF, S.S. v. Am. Arbitration Assoc.,* 64 F.3d 773, 779 (2d Cir. 1995); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.,* 10 F.3d 753 (11th Cir. 1993). *See also Reply to Palmetto Construction's Opposition to Defendants' Motion to Reconsider Alter or Amend.*

(D) : The Respondent's Motion To Stay And Compel, Which Motion The Appellants Expressly Joined In And Consented To, Should Be Properly Adjudicated And The Relief Requested Therein Granted.

The Respondent filed and served a Motion to Stay and Compel mandatory mediation/arbitration contemporaneously with the commencement of this action. The Appellants joined in and consented to this motion as a part of their Motion to Stay and Compel filed on July 11, 2016, thus rendering the motion a joint motion for all parties to the case.

The Clerk of Court "closed out" this motion due to the referral of the case to the Master. (*Transcript of Proceedings Held July 14, 2016*). The Clerk's closure of the motion occurred despite Appellants' formal joinder in the motion. The Master issued a bench ruling, finding that the Clerk's action constituted an adjudication of this motion. (*Id*). The Master's ruling became final in his written order denying Appellants' Motion to Stay and Compel dated July

14, 2016. The summary closure of this joint motion as an administrative matter and the Master's "adjudication" of this motion on that basis does not constitute a proper adjudication of this motion nor a valid basis for waiver of Appellants' arbitration rights. *See General Equipment v. Keller Rigging,* 344 S.C. 553, 544 S.E. 2d 643 (Ct. App. 2001) (finding that the referral of a case to the Master-in-Equity does not constitute a waiver of the right to arbitration). The Master's "adjudication" of this motion in this manner constitutes reversible error.

(E) : The Appellants Have Not Waived Their Right To Mediation/Arbitration Under The Mandatory Alternative Dispute Resolution Provisions Of The Contract And Applicable Law.

1 : The Rulings Of The Lower Court That The Appellants Waived Their Right To Arbitration Constitute Reversible Error And Should Be Reversed.

The Master, without citing any supporting authority, ruled in his July 14, 2016 order that "Defendants' motion to stay and compel arbitration is denied as Defendant is in Default" and in his October 28, 2016 order that "the affirmative defense of arbitration has been waived and Defendants' Motion to Stay and Compel filed July 11, 2016 was not properly made."

The Appellants' appeal from the Master's orders raises significant queries regarding a party's right to arbitration. **Does the singular fact that a default is entered against a defendant constitute a voluntary and intentional waiver of defendant's right to arbitration in South Carolina**? As a necessary corollary, this question raises an additional query; specifically, **Does an entry of default constitute a bright-line dispositive factor, thus excluding, negating and rendering irrelevant all other factors, and associated facts and circumstances, related to the defendant's efforts to enforce arbitration**?

Based on the controlling authorities cited below, the Master's rulings finding a waiver of the right to arbitration constitute reversible error. constitute

2: The Court Is Required To Apply The Proper Legal Standards To The Question Of Whether Appellants Waived Or Defaulted Upon Their Right to Mandatory

Mediation/Arbitration.

The parties' contract contains mandatory alternative dispute resolution provisions requiring the parties to mediate, and if necessary, arbitrate their disputes. The arbitration issue in this case is whether the Appellants have waived their contractual rights, including the substantial right to enforce arbitration.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "Stated differently, waiver requires a party to have known of a right and known he was abandoning that right." *Id.*

The determination of whether the Appellants voluntarily and intentionally waived their right to arbitration must be based on **the application of the proper legal standards to ALL of the facts of this case**.

State Law Standard

The standards for establishing waiver of the right to arbitration are well established in South Carolina. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). In South Carolina, "[i]n order to establish waiver of the right to enforce an arbitration clause, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E. 2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (internal quotation marks omitted).

The Court of Appeals has recognized three factors to consider when determining whether a party has waived its right to compel arbitration. These three factors are as follows: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and

(3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011) (internal quotation marks omitted).

To establish prejudice, the non-moving party must show something more than mere inconvenience. *Id.* (internal quotation marks omitted). In addition to the above factors, the Court of Appeals has also considered the extent to which the parties have availed themselves of the circuit court's assistance. *See id.* at 133, 713 S.E.2d at 808.

Federal Law Standard

The standards to determine waiver are equally well established in federal law jurisprudence. *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008). Under federal law governing arbitration agreements subject to the Federal Arbitration Act[2], the party opposing arbitration bears a heavy burden of proving default or waiver. *Id*. Default or waiver only arises when the party seeking arbitration "so substantially utilize[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200 (4th Cir. 2004); *see also*, *Brown v. Green Tree,* 585 F. Supp. 2d 770.; *Rich v. Walsh*, 357 S.C. 64, 590 S.E. 2d 506 (Ct. App. 2003). Because of the strong federal policy favoring arbitration, the federal courts do not lightly infer the circumstances constituting waiver. *Patten Grading*, 380 F.3d 200.

Turning to the present case, the Master improperly based his ruling on the singular factor of the entry of default. The Master and Court of Appeals did not consider the essential factors listed in either of the legal standards set forth above nor render any findings as to the particular

[2] The Respondent asserts that the Project involves interstate commerce and that the arbitration provisions of the subcontract agreement are, therefore, governed by the Federal Arbitration Act.

facts of this case relevant to these essential factors. A proper analysis of the waiver question must consider all of these factors as well as the entire set of facts and totality of circumstances related thereto. A trial court and any appellate court should review all of the facts of the case, including the entire course of conduct of the Appellants, analyzed under the proper standards governing waiver of arbitration.

2. Applying The Proper Legal Standard To All Of The Facts Of This Case Establishes Appellants Have Not Waived Nor Defaulted Upon Their Right To Mandatory Mediation/Arbitration.

As in all waiver cases, any appropriate analysis is heavily fact-driven. *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753 ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." (quoting *Hyload, Inc. v. Pre-Eng'd Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624)). For this reason, and because there is no set rule as to what constitutes a waiver of the right to arbitration, the Master's finding of waiver based on the singular fact of the entry of default is improper. Motions to compel arbitration can only be resolved after a fact- intensive inquiry. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007). Accordingly, all facts must be considered in addressing the issue of waiver as each case is unique and turns on its own particular facts. *Id.*

Only A Brief Period of Time Passed Between Commencement Of Suit And Appellants' Initial And Continuing Efforts To Assert Their Right To Arbitration Before The Master, Which Efforts Appellants' Continuously Asserted Thereafter

In the present case, the Appellants were unaware of the default status of the case and the scheduled damages hearing scheduled for June 6, 2016 until service of the damages hearing notice on June 2, 2016. (*Ward Affidavits I & II*). Appellants immediately retained legal counsel on June 3, 2016. (*Id.*). Appellants' counsel immediately filed a Motion for Continuance of the damages hearing and a Motion to Set Aside Entry of Default on June 3, 2016 citing the

mandatory mediation/arbitration provisions and Respondent's Motion to Stay and Compel mediation/arbitration as one of Appellants' grounds for relief.[3] (*Defendants' Notice of Motion and Motion for Continuance and Protection Pursuant to SCRCP 6(d) and 40(j); Defendants' Notice of Motion and Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c)*). Appellants' counsel took these actions within 2 ½ months after commencement of this action and within 1 ½ months after the entry of default.

The Appellants' counsel next raised and again put the court on notice of the application of the contractual mandatory mediation/arbitration provisions at the June 6, 2016 hearing. (*Transcript of Proceedings Held June 6, 2016*). The Master expressly acknowledged Appellants' counsel's comments and the existence of the mandatory mediation/arbitration provisions. (*Id.*). In fact, Respondent acknowledged mediation was required and requested the court's assistance during that hearing, "if we need to go to mediation." (*Id.*).

Thereafter, the Appellants again asserted their right to arbitration and formally joined in Respondent's Motion to Stay and Compel by virtue of Appellants' Motion to Stay and Compel mediation/arbitration filed July 11, 2016. (*Defendants' Notice of Motion and Motion to Stay and to Compel Pursuant to SCRCP 12(b)(2) and Applicable Case Law*). Appellants filed their motion less than four (4) months after commencement of the action, within 2 ½ months after the entry of default and within 5 weeks of learning of the entry of default.

The parties reconvened before the Master on July 14, 2016. (*Transcript of Proceedings Held July 14, 2016*).Appellants also filed a memorandum in support of Appellants' Motion to Lift Entry of Default that date. (*Defendants' Memorandum in Support of Defendants' Motion to Set Aside Entry of Default Pursuant to SCRCP 55 (c)*). Appellants'

[3] Appellants understood that Respondent's Motion to Stay and Compel mediation/arbitration remained pending for decision by the court at this time. (A. pp. 0249-0250).

supporting memorandum included their continuing invocation of the right to arbitration, coupled with their demand for stay of this action and submission of the matter to mandatory mediation/arbitration. (*Id.*).

Following the reconvened hearing, the Master issued his order, dated July 14, 2016, denying the Appellants' application for arbitration and setting a damages hearing for October 4, 2016. (*Order of July 14, 2016*).

In response, the Appellants timely filed a Motion to Alter and Amend the Master's order pursuant to SCRCP 59(e) again demanding that this action be stayed and compelled to mandatory mediation/arbitration. (*Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend Pursuant to SCRCP 59(e) and Applicable Case Law*). The Master scheduled the hearing on Appellants' Rule 59(e) Motion for October 11, 2016 (*Charleston County Roster Details – Master's Docket for October 11, 2016*).

In light of the Master's scheduling of the Rule 59(e) motion to be held seven (7) days after the damages hearing, the Appellants, once again, took action to protect their rights to mandatory mediation/arbitration. Specifically, on September 7, 2016, the Appellants informed the Master in writing of the direct impact that hearing on Appellants' Rule 59(e) motion would have on arbitration rights of the parties. (*Attorney Ariail Letter to Judge Scarborough of September 7, 2016; emails with Cover Letter filed with the Court on September 22, 2016*). Accordingly, standing on their rights to mandatory mediation/arbitration, the Appellants requested in writing that the Master schedule the Rule 59(e) motion hearing prior to the October 4, 2016 damages hearing. (*Id.*).

The Master ultimately denied Appellants' request and informed the parties that the damages hearing would proceed on October 4, 2016, followed by the Rule 59(e) motions hearing on October 11, 2016. (*Id.*).

The Master's decision effectively denied the Appellants' Rule 59(e) motion at this stage of the proceedings as proceeding with the damages hearing under these circumstances would have severely prejudiced and potentially forced a waiver of Appellants' rights to arbitration and foreclose any appeal therefrom. Therefore, subject to, without waiving and continuing to fully assert and reserve their rights to arbitration, the Appellants commenced an appeal in this matter on September 30, 2016, which appeal was subsequently dismissed without prejudice with the stipulation that Appellants could appeal after the Master's issuance of a final order on Appellants' Rule 59(e) Motion. (*Notice of Appeal; Order of November 10, 2016*).

The Master ultimately issued his final order denying Appellants' application for arbitration and Rule 59(e) motion, from which Appellants appealed to protect their rights to arbitration. (*Order of October 28, 2016, Notice of Appeal, Opinion No. 5661 of June 26, 2019; Opinion No. 28010 of March 10, 2022*). Appellants' appeals were dismissed as interlocutory and, thereafter, the Master held a default damages hearing (*Opinion No. 5661 of June 26, 2019; Opinion No. 28010 of March 10, 2022; Transcript of Proceedings Held January 31, 2022)*. The prosecution of the damages hearing and the Master's rulings therefrom are currently on appeal by Appellants before this Court. (*Notice of Appeal*).

The Appellants actions described above, coupled with their efforts to protect their rights to arbitration on appeal, show the Appellants' vigorous efforts to assert their right to mandatory mediation/arbitration before the Master as well as the appellate courts throughout this litigation. The Appellants have acted early, often and continuously to protect their rights to mandatory mediation/arbitration during this entire action. Appellants' actions are absolutely consistent with their rights to arbitration and do not constitute a voluntary and intentional abandonment of their rights to arbitration.

Discovery Has Been Extremely Limited In The Master's Court And Minimal Discovery Was Conducted Per The Master's Direction

Discovery has been extremely limited in this case. No depositions have been taken in this action. The Appellants have not served interrogatories, requests to produce nor any other form of written discovery, and accordingly, the Respondent has not responded to any interrogatories, requests to produce or any other form of written discovery. In fact, the only discovery to date is in the form of Appellants' answers to Respondent's basic First Set of Interrogatories and First Request for Production. This participation in discovery by Appellants was minimal and carried out pursuant to the direction of the Master. This minimal discovery at the direction of the Master does not constitute a waiver of Appellants' contractual right to arbitration. *See, Patten Grading,* 380 F.3d at 206 (reciting precedent that the party seeking arbitration will not "lose its contractual right by prudently pursuing discovery in the face of a court-ordered deadline.").

The Court's Assistance Has Been Limited And The Appellants' Have Not Substantially Engaged In Litigation Or Utilized The Litigation Machinery

The Appellants' availing of the court's assistance or utilization of the litigation machinery between the commencement of this action and Appellants' initial assertions of their rights to arbitration has been limited to: (a) two (2) brief motions hearings concerning motions for a continuance of the damages hearing, to lift entry of default and to stay this action and compel mediation/arbitration; and (b) one (1) brief status conference in connection with Appellants' request for a ruling on its Rule 59(e) Motion with the Master issuing two (2) one page orders in connection therewith.

Respondent Has Not Been Prejudiced

Finally, the Respondent has failed to show prejudice through an undue burden caused by the short delay in Appellants' demand for arbitration. In evaluating prejudice,

> our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will likely not exist, and the law would favor arbitration; and (2) if the parties conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system", prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E. 2d 249, 251-52 (citation omitted) (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 76 (Ct. App. 2003)).

The lack of significant discovery in this case establishes that the Appellants have not taken "advantage of the judicial system." *See Id.*; *Patten Grading,* 380 F.3d 200. In fact, the sole discovery conducted herein is extremely limited and is confined to the minimal discovery directed by the Master. Accordingly, prejudice does not exist and the law favors enforcement of the private agreement of the parties to arbitrate their disputes under the contract. *Id.*; *see also Initial Brief of Appellants, Arguments, Section II (B).*

Notwithstanding the lack of actual prejudice, Respondent has attempted throughout this action to claim prejudice through unsworn and unsubstantiated statements of its legal counsel alleging the following: (1) that the passage of time from the date of the entry of default pushed Respondent closer to closing its doors; (2) that Respondent withdrew its motion to compel arbitration and referred the action to the Master as a result of Appellants failure to timely answer; (3) that Respondent faces bankruptcy due to Appellants efforts in advancing the contractual arbitration provisions; (4) that it has incurred attorneys' fees in litigation with Appellants in the circuit court before the Master and in the South Carolina appellate courts.

Statements of legal counsel do not constitute evidence. Proof of prejudice cannot be

speculative nor based upon such unsupported conclusory allegations. *General Equip. & Supply Co., Inc. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200 (4th Cir. 2004).

In addition to lacking proof, Respondent's claims of prejudice do not rise to the level of actual prejudice as a matter of law. Specifically, Respondent's claims of prejudice, individually and/or collectively, fall into one or more of the following categories: (1) conclusory non-evidentiary allegations by Respondent's counsel; (2) alleged activities which are not supported by evidence in the record; (3) alleged activities occurring outside of the short time period between Respondent's commencement of this action and Appellant's application for arbitration which is the period during which prejudice must be considered; (4) alleged activities which could have been avoided but for Respondent's opposition to Appellants' early and continuing application for arbitration; (5) certain nominal/standard procedures which do not constitute prejudice; and/or (6) unsubstantiated and unspecified claims for lost profits, attorney's fees and costs stemming from Respondent's alleged failure as a business as a purported result of Appellant Restoration Specialists, LLC's conduct which the Master found at the damages hearing to be too speculative and lacking sufficient evidence of support in the record. None of these alleged claims constitute actual prejudice to the Respondent. In short, Respondent's alleged claims are insufficient to establish "actual prejudice" under applicable South Carolina or federal law. *General Equip.*, 344 S.C. 553, 544 S.E.2d 643; *Patten Grading*, 380 F.3d 200.

Finally, the Respondent's initial demand for arbitration, which Appellants expressly joined in shortly after commencement of suit, could have been granted/enforced by the Master as early as the initial motions hearing. In light of Respondent's own acknowledgment of the application of mandatory mediation/arbitration to the parties' dispute upon commencing this

case, as well as the totality of the circumstances and facts of this case, any claim of prejudice arising during the brief period between the date litigation commenced and when the Appellants first asserted their right to arbitration lacks merit.

In summary, the proper legal standards under both South Carolina and federal law are set forth above. Applying the proper legal standards to **all of the facts and circumstances of this case**, the Master should have held that the Appellants have not waived their contractual rights to mandatory mediation/arbitration under either state or federal law. *See Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581; *Carlson v. South State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 860 (Ct. App. 2013); *Davis v. KBHome of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2001); *Rich v. Walsh*, 357 S.C.64, 590 S.E. 506 (Ct. App. 2003); *General Equip & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001); *Liberty Builders, Inc. v.Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999); *Brown v. Green Tree Services, LLC*, 585 F. Supp. 2d 770 (D.S.C. 2008); *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, 380 F.3d 200 (4th Cir. 2004). The Master committed reversible error in failing to reach such a holding. Based on the above authorities, the **singular fact that default was entered against Appellants barely a month after this litigation commenced does not constitute a voluntary and intentional waiver of Appellants' right to mandatory mediation/arbitration of the parties' dispute.** To the contrary, a consideration of all the facts in this case establish that the Appellants have vigorously, continuously and consistently asserted their right to arbitration at both the trial court and appellate court levels throughout this entire action. For these reasons, and under the legal authorities set forth herein, the South Carolina Court of Appeals should reverse the orders of the Master and remand this action.

III. BECAUSE THE RESPONDENT TERMINATED ITS LEGAL EXISTENCE THEREBY TERMINATING ANY JUSTICIABLE CONTROVERSY BETWEEN THE PARTIES AND THE COURT'S SUBJECT MATTER JURISDICTION, THE COURT ERRED IN FAILING TO DISMISS THIS ACTION PURSUANT TO SOUTH CAROLINA JURISDICTIONAL JURISPRUDENCE AND SCRCP 12(B)(1).

(A): The Appellants' Arguments Asserting Error In The Lower Court's Failure To Dismiss This Action For Lack Of Subject Matter Jurisdiction Are Set Forth Below.

(1): Appellants' Motion to Dismiss under SCRCP (12)(b)(1) was properly made because the lack of subject matter jurisdiction cannot be waived and may be raised at any time;

(2): The Master erred in failing to dismiss Respondent's action for lack of subject matter jurisdiction because any justiciable controversy terminated as a consequence of Respondent's termination in March 2019;

(3): The Master erred in finding that the termination was improper on the basis that there is no record from the SC Secretary of State that Respondent was ever dissolved as an entity (i.e., in fact the Articles of Termination filed with the Secretary of State explicitly state the date of Respondent's dissolution);

(4): The South Carolina Uniform Limited Liability Act of 1996 does not provide for the revocation or reversal of a termination of a limited liability company, and Respondent's invocation of S.C. Code §33-34-207 to accomplish such revocation is improper;

(5): Respondent's invocation of S.C. Code §33-34-207 to attempt to revoke its Articles of Termination and reinstate itself as an existing LLC is improper;

(6): Respondent's invocation of S.C. Code §33-34-207 to attempt to reinstate itself retroactively to October 30, 2000, the effective date of its Articles of Organization is improper;

(7): The Master's erroneous Finding/Conclusion of a retroactive date of December 12, 2021 for the correction of the Articles of Termination does not defeat the lack of justiciability in this

action;

(8): The Master erred in Finding/Concluding that since Appellants' Motion to Dismiss was heard by the Court after December 12, 2021, there is no basis for the Court to hold Respondent as a terminated entity for purposes of Appellants' Motion to Dismiss (i.e., the proper determinative date of Respondent's company status under Appellants' Motion to Dismiss should be the date of filing of Appellants' motion on April 21, 2021);

(9): The affidavits submitted in support of Respondent's Articles of Correction to the SC Secretary of State raise credibility issues and do not constitute competent evidence dispositive of the propriety and efficacy of the revocation of Respondent's Articles of Termination.

The grounds for Appellants' argumenta are contained in *Defendants' Notice of Motion and Motion to Dismiss Pursuant to SCRCP 12(b)(1); Memorandum in Support of Defendants' Motion to Dismiss; and oral arguments made at the hearing on Appellants' Motion to Dismiss (see Transcript of Proceedings Held January 31, 2022*). Appellants hereby crave reference to and incorporate these grounds, memoranda and oral arguments by reference for the Court's appellate review and opinion.

IV. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION TO EXCLUDE AND STRIKE.

(A): Appellate Standard of Review.

The admission of evidence is a matter left to the discretion of the trial judge and, absent a clear abuse of discretion, will not be disturbed on appeal. *Carlyle v. Tuomey Hosp.,* 305 S.C. 187, 407 S.E.2d 630 (1991). To establish an abuse of discretion based on the admission of evidence, a party must demonstrate both error and prejudice. *Timmons v. S.C. Tricentennial Comm'n,* 254 S.C. 378, 175 S.E.2d 805 (1970).

(B): The Master's Findings/Conclusions Denying Appellants' Motion to Exclude And Strike On The Basis That Appellants' Evidentiary Objections Were Not Contemporaneously Made As The Evidence Was Offered And Therefore Waived And, That In Any Event The Evidence Is Relevant And Admissible Constitute Reversible Error.

The Court's findings/conclusions that were the subject of Appellants' Motion to Exclude and Strike are erroneous, lack the requisite evidentiary support, are contrary to the record in this matter and prejudiced Appellants resulting in the wrongful admission of evidence and constituting an error of law upon which a multi-million dollar joint and several judgment was entered against them. Specifically, 1) that Respondent "offered" evidence at the damages hearing, (2) that evidence was "admitted" at the hearing, 3) that Appellants were afforded a full opportunity to object to the evidence at the hearing and didn't make such objections, 4) that Appellants objections were not contemporaneously made as the evidence was offered and were therefore waived and 5) that objections made pursuant to SCRCP 52(b) were not allowed, are all errors of law, lack the requisite evidentiary support, are contrary to the record in this matter and result in severe prejudice to Appellants.

Respondent Never Offered Documentary Evidence at the Damages Hearing In This Case.

At no time during the damages hearing did Respondent offer documentary evidence in this case. The contested documents were never marked as exhibits, never authenticated, and never offered as evidence by Respondent. (*Transcript of Proceedings Held January 31, 2022; Defendants' Motion to Exclude and Strike; Defendants' Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike and Strike; Defendant's Motion to Reconsider and to Alter, Amend or Relieve the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment*). Rather, on February 1, 2022, the day after the damages hearing, Respondent filed its purported trial exhibits with the Clerk of Court. (*Plaintiff's (First) Filing of Trial Exhibits and Plaintiff's (Second) Filing of Trial*

Exhibits). In fact, in Respondent's Opposition to Defendant's Motion to Strike or Exclude, Respondent admits that it "cannot discount the possibility that the materials were not formally moved into evidence after Defendants' objections were overruled" and then questions whether that is even "a requirement in a non-jury default damages hearing". (*Plaintiff's (First) Filing of Trial Exhibits and Plaintiff's (Second) Filing of Trial Exhibits).*

The Court Never Admitted Evidence at the Damages Hearing in This Case

At no time during the damages hearing did the Court admit evidence in this case. (*Transcript of Proceedings Held January 31, 2022).* Rather, on February 1, 2022, the day after the damages hearing, Respondent filed its purported trial exhibits with the Clerk of Court. (*Plaintiff's (First) Filing of Trial Exhibits and Plaintiff's (Second) Filing of Trial Exhibits).*

The Appellants Did Indeed Object to the Evidence at the Hearing and Was Given a Continuing Objection by the Court, Such Objections were Contemporaneously Made as the Evidence was Offered and Therefore Were Not Waived

Appellants objected to the evidence at the hearing early and often. Initial objections were made insomuch as the purported evidence presented was not related to the allegations contained within the four corners of the Complaint which should be the type of evidence presented in a damages hearing. (*Transcript of Proceedings Held January 31, 2022*). After these objections, the Court indicated that "You'll have a continuing objection; so I don't need to go through it all the time." (*Transcript of Proceedings Held January 31, 2022)*.

Respondent relied upon a notebook of tabbed documents to elicit testimony from ts sole witness which it handed up to the witness and the Court at the start of the hearing (*Transcript*). At no point during the hearing was the notebook or the documents it contained authenticated, offered into evidence or accepted into evidence. (*Transcript of Proceedings Held January 31, 2022*). Rather, when questions were first posed related to do documents

contained in the notebook that were not attached to the pleadings in this matter. Appellants expressly objected to those documents stating in part that "…it hasn't been authenticated. It's not even the same document that's referenced in the subcontract. [Appellants' counsel] would object to it being used in this hearing. (*Transcript of Proceedings Held January 31, 2022*). In response, the Court overruled the objection and asked Respondent to "[l]ay some foundation" for it. ((*Transcript of Proceedings Held January 31, 2022*). Appellants further objected stating "[t]here's been no indication who prepared this document. It's not dated as required by the subcontract. The subcontract was very specific that the document - - a document attached - -" (*Transcript of Proceedings Held January 31, 2022*). In response, the Court stated "All right. I'm going to stop you because I understand that you are making an objection, and you're entitled to do some objecting. But basically, when you're in default, a defaulting party is allowed to cross-examine the witness. I'm going to give you full ability to do that. But right now, it's beyond that. So I want them to make a record, and we will proceed. Okay? So overruled." (*Transcript of Proceedings Held January 31, 2022*). Again, when testimony continued related to that tabbed document contained in the notebook, Appellants asked for confirmation that their standing objection was still applicable to which the Court responded, "Sure". (*Transcript of Proceedings Held January 31, 2022*). With the understanding that the standing objection applied to the remainder of the Respondent's questioning, Appellants made no further objections concerning testimony outside of the four corners of the Complaint or testimony concerning the documents in the notebook that remained unauthenticated, that were never offered into evidence, and that were never admitted into evidence by the Court.

At the beginning of their closing arguments to the Court, Appellants asked to confirm that their objections went through the entire hearing [line of testimony?]. (*Transcript of Proceedings Held January 31, 2022*). In response, the court indicated "They're on the record"

and then qualified that response with "I'm not going to say your objection was to the entire line of testimony, but certainly it was expansive. I will grant you that." (*Transcript of Proceedings Held January 31, 2022*). In response, Appellants argued that there was absolutely nothing authenticated and that the documents were hearsay. (*Transcript of Proceedings Held January 31, 2022*). Appellants further argued that the testimony was outside of the four corners of the Complaint and, therefore, the causes of action in the Complaint should be stricken or, in the alternative, that no damages should be awarded on Respondent's five causes of action. (*Transcript of Proceedings Held January 31, 2022*).

Objections Made Pursuant to SCRCP 52(b) Which Allows a Party to Question the Sufficiency of the Evidence That Supported the Findings in the Entry of Judgment of an Action Tried by the Court Without a Jury Were Properly Made And Should Be Upheld

By Defendants' Notice of Motion and Motion to Exclude and Strike, filed February 22, 2022, Appellants expressly preserved any and all objections to the contents of the proposed order filed by Respondent on February 16, 2022 as well as those to the contents of any order or judgment ultimately issued by the Court which could be addressed in post-trial motions pursuant to the SCRCP and/or the SCRE. *Defendants' Notice of Motion and Motion to Exclude and Strike, filed February 22, 2022*.

By Defendants' Notice of Motion and Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike, filed March 10, 2022,[4] Appellants expressly requested, pursuant *inter alia*, to SCRCP 52(b) that the Court reconsider and alter or amend its Order Denying Defendants' Motion to Exclude and Strike dated

[4] Exhibit A to Defendant's Notice of Motion and Motion to Reconsider and to Alter or Amend the Court's Order Denying Defendants' Motion to Exclude and Strike provided the Court with a detailed catalog of valid objections describing Appellants' specific objections to each document designated and attached as "exhibits" in Respondent's two Notices of Filing Trial Exhibits filed with the Charleston County Clerk of Court on February 1, 2022.

February 28, 2022 by excluding and striking (a) the documents designated and attached as "exhibits" in Respondent's two Notices of Filing Trial Exhibits filed with the Charleston County Clerk of Court on February 1, 2022; and (b) all testimony related to those documents. Appellants' Rule 52(b) motion allowed Appellants to question the sufficiency of the evidence that supported the findings in that Order inasmuch as the action was tried by the court without a jury. Rule 52(b). Rule 52(b) allows a party to question the sufficiency of the evidence whether or not the party raising the question on a Rule 52(b) motion made an objection to the trial court during the hearing of the matter. Rule 52(b).

V. THE LOWER COURT ERRED IN AWARDING DAMAGES FOR THE ALLEGED BALANCE DUE AND SHARE OF PROFITS UNDER THE CONTRACT, INDEMNITY FROM SURETY CLAIMS AND INTEREST THEREON, AND PRE-JUDGMENT INTEREST AND ENTERING A JOINT AND SEVERAL JUDGMENT THEREON AGAINTS ALL APPELLANTS.

(A): Appellate Standard of Review.

When legal and equitable causes of action are maintained in one suit, each retains its own identity as legal or equitable for standard of review purposes and must be analyzed accordingly. *Ahrens v. State,* 392 S.C. 340, 709 S.E.2d 54 (2011). In such a suit tried before a Master in Equity, factual findings on legal causes of action will not be disturbed on appeal unless such findings are not reasonably supported by the evidence. *Estate of Tenney v. S.C. Dep't of Health & Envil. Control,* 393 S.C. 100, 712 S.E.2d 395 (2011). However, an appellate court may determine questions of law with no particular deference to the Master in Equity in such actions. *Id.* As to equitable causes of action in such an action, the appellate court should review the facts in accordance with its own view of the preponderance of evidence in the record. *Osterneck v. Osterneck,* 374 S.C. 573, 649 S.E. 127 (Ct. App. 2017).

(B): The Respondent's Complaint, and Appellants' Admission By Default Of The Allegations Contained Therein, Are Insufficient To Establish Liability on Respondent's Claims And Cannot Sustain The Default Judgment.

The entry of an order of default is an admission by the defaulting party of the **well-pleaded allegations** of the complaint. *State v. Love Shop, Ltd.,* 286 S.C. 486, 334 S.E.2d 528 (1985) (emphasis added). The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiffs' declaration or complaint…Hence the default authorizes the **entry of any judgment warranted by the facts alleged.** *Id.; Gadsden v. Home Fertilizer & Chemical Co.,* 89 S.C. 483 72 S.E. 15 (1911). A default does not result in the admission of allegations that are not well-pled nor does it preclude a defendant from showing that under the facts as deemed admitted, the complaint fails to state a claim for relief or no claim existed which would allow the plaintiff to recover. *Fink v. Dodd, 286 Ga. App. 363, 649 S.E.2d 359 (2007).* Indeed, a default is not "an absolute confession by the defendant of his liability and of plaintiff's right to recover," but is instead merely an "admission of the facts cited in the complaint, which by themselves may or may not be sufficient to establish a defendant's liability. *Pennsylvania National Mutual Casualty Insurance Company v. Brandy Edmonds, Civil Action 09-0089-WS-B (In the United States District Court for the Southern District of Alabama, Southern Division, Order filed 03/03/10).*

Likewise, while well-pleaded facts in the complaint are deemed admitted, a plaintiff's allegations relating to the amount of damages are not admitted by virtue of default; rather the court must determine both the amount and character of damages. *Virgin Records America, Inc. v. Lacey, 510 F.Supp. 2d 588, 593 n.5 (S.D. Ala. 2007).* A plaintiff seeking a default judgment is confined to the specific factual allegations and demands delineated in the Complaint. *Pennsylvania National, Pg. 9.* Thus, recovery is limited to the kind and amounts of losses set forth in the pleadings. *Pennsylvania National, Pg. 10.* Even in the default

judgment context, "[a] court has an obligation to assure that there is a legitimate basis for any damage award it enters" *Anheuser Busch, Inc. v. Philpot, 317 F.3d 1264, 1266 (11th Cir. 2003).* and "judgment may be granted only for such relief as may lawfully be granted upon the well-pleaded facts alleged in the complaint." *Capitol Records v. Carmichael, 508 F.Supp. 2d 1079, 1084 (S.D. Ala. 2007).*

Accordingly, this Court, upon appellate review, must consider the following queries: (a) Have all elements of the cause(s) of action upon which the default judgment is rendered been pled? (b) Have factual allegations been asserted and admitted by default which are sufficient to sustain these causes of action and the default judgment rendered thereon? and(c) Is there a legitimate basis (factual and legal) under the causes of action as pled in Respondent's Complaint for the default damage award entered by the lower court against the Appellants? The answer to these questions is a resounding no rendering the entry of default judgment against Appellants reversible error. *See Defendants' Notice of Motion and Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment, including Exhibit C. attached thereto.*

(C): <u>Breach of Subcontract Balance Due</u>

The Court's award of $184,858.69 in damages for the alleged subcontract balance, and its findings/conclusions supporting this damages award, constitute reversible error on the following grounds:

(1): The subcontract between Appellant Restoration and Respondent was a stipulated sum in the amount of $1,082,342 with no modifications issued. (*Transcript of Hearing Held January 31,* 2022). Respondent admitted these facts at the damages hearing. (*Id.).* Respondent further admitted at the damages hearing that Appellant Restoration paid

Respondent $1,096,858.69 under the subcontract. (*Id.)*. Accordingly, Respondent was overpaid for its subcontract work and was not due what it claimed as "total compensable costs" at the damages hearing.

(2): The Court's finding/conclusion that "amounts due under the subcontract was alleged in [Respondent's] complaint, was admitted when [Appellants] went into default, and cannot now be contested" is erroneous, lacks the requisite evidentiary support and is contrary to the court record in this matter. Specifically, [Respondent's] Complaint, in its First Cause of Action – Breach of Agreements, alleges "Palmetto has been damaged in a sum to be determined." Nowhere in the Complaint is there an amount due or a sum certain alleged for any of Respondent's alleged damages, including those purportedly due under the subcontract. The damages hearing was the vehicle to determine the amounts owed, if any, and Appellants were certainly entitled to contest the calculation of damages at the damages hearing. Moreover, the Court's finding/conclusion above ignores the express language of the subcontract and the testimony of Respondent's sole witness, Ms. Peterson, who acknowledged the subcontract was a stipulated sum contract in an amount less than the amount of payment received by Respondent.

(3): The Court's finding/conclusion that "the parties conduct indicates an agreement that Palmetto was due its total costs of the work" is erroneous, lacks the requisite evidentiary support, exceeds the scope of Respondent's Complaint (and allegations/claims/causes of action and damages pled therein), is not relevant or material to any fact at issue under the subcontract in the damages hearing, ignores the Court's finding that Respondent alleged amounts due 'under the subcontract" (as opposed to amounts due under some course of dealing or an "agreement" outside of the subcontract), and contradicts the Court's finding/conclusion that the express language of the subcontract and the testimonial admissions of Ms. Peterson at the

damages hearing establish the Respondents agree upon compensation to be the stipulated sum of $1.082,342.10 under the subcontract.

(D): <u>Breach of Contract – Share of Profits</u>

The Court's award of $225,389.81 in damages for the alleged share of profits, and its findings/conclusions supporting this damages award, constitute reversible error on the following grounds:

(1): The Court's finding/conclusion that Respondent is entitled to an award of 50% of the profits earned on the VA project is erroneous and lacks the requisite evidentiary support. Specifically, there is no subcontract provision that indicates that Respondent was entitled to 50% of the profits. While the subcontract at Section 9.3 under a subsection entitled "**Portion of Work**" expressly indicates to "[s]ee PCG Subcontract Breakdown spreadsheet dated 9/5/14 provided, attached", there is no reference within this subsection to a profit-sharing agreement. Moreover, Respondent has never produced a PCG Subcontract Breakdown spreadsheet dated 0/5/14, or otherwise, at any point in this litigation. There was no attachment to the subcontract which was filed by Respondent as an exhibit to its Complaint. Likewise, there was no PCG Subcontract Breakdown spreadsheet dated 9/5/14, or otherwise, entered into evidence at the damages hearing. Rather, Respondent produced at the damages hearing an unauthenticated, hearsay document entitled "PCG Subcontract Breakdown" that is undated, unsigned and insufficient to sustain a default damage award for an alleged share of profits.

(2): The Court's statement that "[t]he testimony during the hearing established that the initial estimated profit on the job was in the $500,000-600,000 range, because of changes in the work that expended the scope of the work and increased the contract sum by over $2,000,000, the estimated profit grew to around $1,000,000" is erroneous, lacks the requisite evidentiary support, exceeds the scope of the Complaint (and allegations/claims/causes of

action and damages pled therein), is not relevant or material to any fact at issue in the damages hearing, and is contradicted by documents discussed during the damages hearing; specifically, the large change orders to the VA Contract that all predated the subcontract between Respondent and Appellant Restoration.

(3): The Court's references to calculations performed by Appellant Restoration should be stricken as well as all references to the purported use of Appellant Restoration's costs of $541,980.80 insomuch as Ms. Peterson testified that calculation of profits cannot be made until a project is completed, and these calculations were based on incomplete information provided prior to completion of the project. (*Id.*).

(4): The Court's statement that "…Mrs. Peterson testified that [Appellants] refused to provide accounting records during or after the job from which [Respondent] could determine the financial status of the job or [Appellants] be stricken insomuch as no such accounting was required by the subcontract between [Appellant Restoration and Respondent].

(5): The Court's finding/conclusion that "[i]t is hard for this Court to imagine penalizing [Respondent] when documents that were **ordered produced** (emphasis added) were not produced, and when any uncertainty about the job's profitability stems from the failure to produce those documents in compliance with the **Court order** (emphasis added)…" is erroneous, lacks the requisite evidentiary support, refers to a **"Court order"** which does not exist, and is contrary to the court record in this matter. *See Statement of the Case*.

(E): <u>Indemnity from Claims by the Surety and Interest Thereon</u>

The Court's award of $1,307,978.71 in damages for indemnity from claims by the surety, plus prejudgment interest on that amount in the amount of $537,057.15 (*see Court's Order and Judgment Section II. D. and G.*) and its findings/conclusions supporting these

damages awards, constitute reversible error on the following grounds:

(1): The Respondent's Fourth Cause of Acton entitled "Other Legal and Equitable Relief" merely alleges: (1) "[a]ll [Appellants] are contractually bound to pay funds if there are claims on the surety bond", (2) "[t]here are claims on the surety bond", and '[p]laintiff requests legal and equitable relief against the Defendants". (*Complaint*). Respondent's allegations fail to assert actionable causes of action, fail to contain necessary elements to a recovery of indemnity under legal or equitable grounds, and merely request but do not assert entitlement to such legal or equitable relief. At best, Appellants' default admits Respondent's request for legal/equitable relief but not its' entitlement to such relief. Furthermore, Appellants' default does not admit necessary elements of recovery or requisite factual allegations which are lacking and unpled in Respondent's Complaint.

(2): The Respondent, in seeking an award for indemnity, is bound by the well pled allegations in its Complaint and Appellants are deemed to have admitted only those particular allegations in a default damages hearing. Respondent's legal claim for indemnity, and the supporting allegations alleged by Respondent, are based upon the Indemnity Agreement attached to Respondent's Complaint. The Respondent, in seeking an award for indemnity under the Indemnity Agreement, and the Court in rendering an indemnity award thereunder, both ignore Paragraph 20 of the Indemnity Agreement. Specifically, Paragraph 20 reads: "**The Indemnitors waive and subordinate all rights of indemnity subrogation and contribution each against the other until all obligations to the Surety have been satisfied in full."** (emphasis added). (*Indemnity Agreement*). The award of any legal relief for indemnity from Appellants to Respondent is governed by the terms and conditions of the Indemnity Agreement. Respondent alleged these terms and conditions by the allegations contained in its Complaint and the attachment of the Indemnity Agreement to the Complaint. The Appellants'

default constituted an admission of these particular allegations for purposes of the damages hearing. Respondent's claim for legal relief under the Indemnity Agreement and a damages award for indemnity thereunder cannot be greater than Respondent's rights under the Indemnity Agreement. Respondent's sole witness at the damages hearing acknowledged and testified at the hearing that Respondent had not made any payments to the surety, much less payment in full. (*Transcript of Proceeding Held January 31, 2022)*. By its own admission, Respondent failed to satisfy the essential element of payment to the surety prior to an award of indemnity to Respondent. Accordingly, the Court's award of indemnity to Respondent under the Indemnity Agreement contradicts the Indemnity Agreement, lacks the requisite evidentiary support, and is erroneous as a matter of law and fact.

(3): The Respondent, in seeking an award of equitable relief in the form of indemnity and the Court in granting such relief, also both ignore the essential requirement of payment to the surety prior to an award of indemnity to Respondent. An award of indemnity to Respondent under equitable principles (of equitable subrogation or otherwise) is barred by the failure of payment to the surety. *American Surety Co. of New York v. Westinghouse Elec. Mfg.* 296 U.S. 133 (1935); *Dannerbeck v. Palmer,* 502 F.2d 686 (9th Cir. 1974): *Bank of Marlington v. McLaughlin,* 123 W. Va. 608 (W.VA. 1941); *Longview School Dist. No. 112 of Cowlitz County v. Stubbs Electric Co.,* 295 P. 186, 160 Wash. 465 (Wash. 1931); *Jos. A. Bank Clothiers, Inc. v. Brodsky,* 950 S.W.2d 297 (Mo. App. 1907); *Restatement (Third) of Suretyship & Guaranty*, §27 (1996). It is essential to a recovery of damages under equitable principles that Respondent must make and prove full payment to the surety **before** it is entitled to equitable relief on this claim. *(Id.)***.** By its own admission at the damages hearing, Respondent failed to make single payment to the surety, much less payment in full. (*Transcript of Hearing January 31, 2022).* Respondent failed to prove and satisfy this essential element of recovery (payment to the

surety) under principles of equity. Accordingly, the Court's award of indemnity to Respondent as a form of equitable relief lacks the requisite evidentiary support and is erroneous as a matter of equity and fact.

(3): Respondent alleged in its Complaint that the [Appellants] "must indemnity the surety and Plaintiffs (sic) to the extent they are required to pay." (*Complaint*) Thus, the Respondent admitted in its own Complaint that any liability of the Appellants to indemnify: (a) the surety was limited to the amount that the surety paid and (b) the Respondent was limited to the amount that the Respondent paid. However, there can be no liability to the surety inasmuch as the surety is not a party to this action, has not asserted causes of action against the Appellants and is barred by the statute of limitations from pursuing indemnity claims against either the Respondent or the Appellants. Likewise, there can be no liability to the Respondent since, by its own admission, Respondent has not made a single payment, much less full payment to the surety. (*Id.)*

(4): The Court's finding/conclusion that "[p]ayment shall be made to the Surety by the Indemnitors *as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefore."* (emphasis added) as a basis for grounds for awarding indemnity to Respondent misapplies this provision in the Indemnity Agreement in its analysis of **Respondent's entitlement** to indemnity in this action. The provision cited by the Court governs payment to be made **to the Surety by the Indemnitors,** not payment to be made from one indemnitor to another. (*Indemnity Agreement*) As such, the Court's finding/conclusion conflates an obligation of payment to the surety under the Indemnity Agreement into an obligation of payment by the Appellants to Respondent. The Court's finding/conclusion in this regard constitutes reversible error.

(5): The Court's finding/conclusion that "Plaintiff introduced into the record two letters

sent to it by the surety…demanding payment from the indemnitors" and characterizing such letters as "evidence" in support of its award of indemnity to Respondent constitute reversal error. First, these letters were never admitted as evidence. (*Defendants' Notice of Motion and Motion to Exclude and Strike, filed February 22, 2022*.) Second, these two letters are irrelevant to the Respondent's entitlement to an indemnity award at the damages hearing. These letters were issued by the surety and constitute a demand for payment by the indemnitors **to the surety**. These letters do not demand payment to **Respondent** and do not establish Respondent's entitlement to indemnity from the Appellants. The fatal flaws in Respondent's indemnity claim previously cited are not corrected by these letters and, once again, the Court conflates the surety's demand for payment by the Indemnitors under the Indemnity Agreement into an obligation of payment by the Appellants to Respondent.

(F): <u>Interest</u>

The Court's award of pre-judgment interest is erroneous as a matter of law and fact and lacks the requisite evidentiary support and constitutes reversible error on the following grounds:

(1): Respondent did not plead a claim for prejudgment interest in its Complaint. *Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000).* Appellants' default does not correct this omission as they cannot be in default upon a claim for prejudgment interest that was never pled.

(2): The Respondent is not entitled to an award of damages on its claims for amounts allegedly due on the subcontract or indemnity, thus making the Court's pre-judgment interest award improper in this action. *See Sections C, D and E above.*

(3): The Court's finding/conclusion that "the amount due on the subcontract was a sum

certain, demandable as of at least October 4, 2016 is improper inasmuch as Appellant Restoration overpaid Respondent under the subcontract and Respondent is not entitled to an underlying award of damages for amounts allegedly due on the subcontract. *See Section A. above.*

(4): The Court fails to cite any statutory provision or contractual agreement allowing the Respondent to recover pre-judgment interest from the Appellants under their claims for amounts allegedly due on the subcontract or indemnity. The lack of such statutory or contractual authority is fatal to Respondent's unpled and untimely improper oral request for pre-judgment interest at the damages hearing. *Llewelyn v. Dobson Bros., 274 S.C. 177, 262 S.E.2d 726 (1980).*

(5): The Court's award of pre-judgment interest on the amount of the surety's claims against the indemnitors, which claims were not paid by Respondent, is improper.

(G): Joint and Several Award Of Damages And Entry Of Judgement Against All Appellants

Subject to, and without waiving the above arguments and objections on appeal, the Appellants submit, in the alternative, that the Master's joint and several damages award for the alleged subcontract balance, profit split, indemnity and for prejudgment interest on these amounts lacks evidentiary support and is erroneous as a matter of fact and law. Specifically, the breach of contract claim is asserted solely against Appellant Restoration and not against the individual Ward Appellants. The amount of the award under this cause of action is $494,922,78. Nonetheless, the Master has included this amount in its award of damages against the individual Ward Appellants as well. This sum of $494,922.78 should not have been included in the damages award and entry of judgment against the individual Appellants, Mark Ward and Lynette Ward. A spreadsheet illustrating and supporting this argument is attached

as Exhibit B to *Defendants' Notice of Motion and Motion to Reconsider and to Alter, Amend or Relieve Defendants' from the Court's Order Denying Defendant's Motion to Dismiss and Entering Default Judgment* and incorporated herein.

CONCLUSION

For the grounds and reasons set forth herein, the lower court's rulings should be reversed, Appellant's Motion to Reconsider should be granted and the relief requested therein granted.

Respectfully submitted,

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December 22, 2022
Charleston, South Carolina

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Dec 22 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2016-002096

Palmetto Construction Group,	Respondent
v.	
Restoration Specialists, LLC, Reuben Mark Ward, and Lynnette Pennington Ward	Appellants

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PROOF OF SERVICE

The undersigned hereby certifies that on the 22nd day of December 2022, I served the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Appeal on the above-named Respondent via email to its respective counsels of record, containing the above referenced documents as attachments in .pdf format, sent to the addresses shown below:

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December 22, 2022

s/A. Bright Ariail

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RECEIVED
Dec 22 2022
SC Court of Appeals

December 21, 2022

VIA EMAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Palmetto Construction Group v. Restoration Specialists, LLC *et al.*
Appellate Case No. 2022-001224

Dear Ms. Kitchings;

Enclosed, please find for filing, on behalf of Appellants Restoration Specialists, LLC, Reuben Mark Ward and Lynnette Pennington Ward, the following documents in the above captioned appeal:

1. Initial Brief of Appellants;
2. Appellants' Designation of Matter to be Included in the Record on Appeal; and
3. Proof of service of the Initial Brief of Appellants and Appellants' Designation of Matter to be Included in the Record on Appeal.

By copy of this letter, I am serving counsel for Respondents with same.

With kindest regards, I am

Sincerely yours,

s/A. Bright Ariail
A. Bright Ariail

Enclosures

cc: Jann Rennik, Esquire (via email only)
Michelle Endemann, Esquire (via email only)

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