IN 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

REPLY BRIEF OF APPELLANTS

Bright Ariail
SC License #69570
Law Office of A. Bright Ariail, LLC
125 Wappoo Creek Drive
Building E – Suite 202
Charleston, SC 29412
843/814-8805
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO INITIAL BRIEF OF RESPONDENT

IN REPLY TO THE INITIAL BRIEF OF RESPONDENT Palmetto Construction Group, LLC ("PCG"), Appellants Restoration Specialists, LLC ("RS"), Reuben Mark Ward ("Ward") and Lynette Pennington Ward ("Lynnette Ward"), provide the following:

STATEMENT OF THE CASE

C. Damage Hearing

Respondent contends that "Appellants moved to reconsider all of the Master's February 2022 orders (Motions to Reconsider), but never sent copies of the motions to the trial court, as required by Rule 59(g)".

Respondent's contention is irrelevant and lacks merit for the following reasons:

- Appellant's Motion to Reconsider and to Alter, Amend or Reliever Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment ("Motion to Reconsider") was filed electronically thereby providing the trial court with a copy upon filing.
- By the express language of the Order responding to Appellant's Motion to Reconsider (August 1, 2022 Order), the Master exercised his discretion to consider and rule upon the issues, motions, arguments and matters presented in Appellant's Motion to Reconsider regardless of any Rule 59(g) requirement to send a copy of the motion to the trial court insomuch as it stated "having reviewed the motions" it decided "each motion filed", *inter alia*, on "substantive grounds". (*Form 4 Order).*
- Appellants' Motion to Reconsider was made pursuant to Rules 52, 55, 59 and 60, SCRCP. Rules 52, 55 and 60, SCRCP do not contain any references to providing a copy of the motion to the trial court.

STATEMENT OF THE FACTS

Respondent contends that "Ward asked that PCG obtain the bond from its surety, Hanover, ***in exchange for a 50% split of the project profits.*** PCG agreed and the parties entered into a subcontract dated September 10, 2014. (Subcontract).

Respondent's contention lacks merit for the following reasons:

- Respondent's contention is inadmissible hearsay, lacks evidentiary support and fails to reference supporting materials in the record on appeal.
- There was no agreement for a 50% split of the profits between the parties. *See* Initial Brief of Appellants.
- By the express language of the Teaming Agreement, "nothing [t]herein shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the parties; except as may be provided for in any resultant contractual arrangement agreed to between the Parties. *Id.*, (Ex. B,Compl.)
- The Subcontract did not allow for a 50% split of the profits. *Id.*, (Ex. A, Compl).

Respondent contends that "PCG too was owed over $180,000.00 pursuant to its own subcontract with Restoration."

Respondent's contention lacks merit for the following reasons:

- Concerning Appellant's assertion that PCG was overpaid, the Subcontract was a stipulated sum subcontract and PCG was paid more than the stipulated sum amount. RS overpaid PCG by more than $14,000.00. (Tran. of Jan. 31, 2022 hearing at 71, ln. 12 – 75, ln. 5).

ARGUMENT
Introduction

1) By Footnote 3, Respondent contends that the incorporation of "all" of Appellant's prior briefing contained in the record of this case is "insufficient to raise an argument for this Court's consideration, as that requires citations to authority and supporting argument."

Respondent's contention lacks merit for the following reasons:

a) The referenced "briefings", which do not constitute "all of Appellants' prior briefing in this matter", are supporting legal memoranda that are specifically identified, indexed, and contained in the record on appeal. These briefs provide citations to specific authority and supporting arguments on the contested issues and trial court rulings on appeal in this matter and Appellants citation/reference to them is appropriate.

I. ENTRY OF DEFAULT WAS IN ERROR, APPELLANTS WERE NOT PROPERLY HELD IN DEFAULT, AND DEFAULT JUDGMENT WAS IMPROPERLY ENTERED AGAINST ALL DEFENDANTS IN AN IMPROPER AMOUNT

A. The Master's Denial of Appellants' Motion To Be Relieved From Entry of Default Was Error Under The Rule 55(c) Good Cause Standard. The Master's Denial of Appellants Motion For Reconsideration And To Alter, Amend or Relieve Defendants From The Court's Order Denying Defendants Motion To Dismiss and Entering Default Judgment Requesting That The Default Judgment Be Vacated Was Error Under the Rule 60 (b) Excusable Neglect Standard

By Section I. A. 1, Respondent contends that Appellants failed to preserve the "excusable neglect" standard of Rule 60(b) argument in three respects, and thus further contends the Rule (c) "good cause" standard remains the applicable standard for purposes of this Court's review of Appellants' requests for relief from default. Those three alleged respects are set forth in Respondent's subparagraphs thereto, including subparagraphs a., b., and c. Appellants refute these contentions below:

a. Respondent contends that the excusable neglect standard argument was waived and not preserved since it was allegedly not cited nor argued in Appellants' July 27, 2016 Motion to Reconsider the trial court's denial of the Motion to Set Aside [Entry of] Default.

Respondent's contention lacks merit for the following reasons:

- Respondent confuses the rules, applicable standards, and the procedural history of this case as they apply to setting aside an entry of default versus setting aside a default judgment. Here,

Respondent's argument is nonsensical. Rule 60(b) was not applicable to Appellants' July 27, 2016 Motion to Reconsider the trial court's denial of Appellants' Motion to Set Aside Entry of Default. Respondent's Motion to Set Aside Entry of Default was based on SCRCP 55(c) and sought to set aside the ***Entry of Default*** (emphasis added). **(**RS June 3 2016 Motion, & July 14, 2016 Memo)**.** The trial court denied Appellants' Rule 55(c) motion and Appellants sought reconsideration of that order under Rule 59(e) on July 27, 2016. Insomuch as there had been no default judgment entered as of July 27, 2016, Rule 60 was not applicable in the Motion to Reconsider seeking to lift the **Entry of Default**. (Mot to Reconsider).

- The South Carolina Supreme Court expressly stated in its March 10, 2021 Opinion in this matter that [o]n appeal from a final judgment, the defendants may challenge any Rule 55(c) determination of good cause **and** Rule 60(b) determinations such as excusable neglect. (*Opinion 28010*).

b. Respondent contends that Appellants made no argument to the trial court at any time as to why their conduct constituted excusable neglect.

Respondent's contention lacks merit for the following reasons:

- Respondent commenced this lawsuit on March 14, 2016 with the contemporaneous service of the Complaint and Respondent's Motion to Stay and Compel (expressly requesting the trial court to stay the lawsuit brought by the Complaint and compel arbitration of the issues asserted in the Complaint) upon the Appellants. Prior to June 3, 2016, Appellants filed two Affidavits of Reuben Mark Ward on June 6, 2016 to support their motions filed on June 3, 2016, including the Motion to Set Aside the Entry of Default, one of which specifically provided information regarding why the Complaint had not been answered ("Ward Affidavit II"). At this point in the litigation, the standard for granting relief was mere "good cause". The facts contained within

the Ward Affidavit II, and Respondent's contemporaneous service of the Complaint and its Motion to Stay and Compel invoking arbitration, have not changed and likewise support granting relief from the default judgment entered on February 28, 2022 under the "excusable neglect" standard. Appellants' request for relief from default under the Rule 55 "good cause" standard upon the entry of default and the Rule 60(b) standard upon the entry of default judgment are both included in Appellant's Motion to Reconsider and Alter, Amend or Relieve Defendant's from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment filed on March 10, 2022 under the heading "DEFAULT".

- The factors common to an analysis of both the Rule 55(c) "good cause" standard and the Rule 60(b) "excusable neglect" standard are: (1): timing/promptness of motion for relief; (2): existence of a meritorious defense; and (3) degree of prejudice to the non-moving party. Rule 55(c) and Rule 60(b), SCRCP. Appellants have argued these common factors to the trial court throughout this litigation in its written motions and legal memoranda as well as in oral arguments during multiple hearings before the trial court.
- The damages hearing was held on January 31, 2022. Thereafter, on February 28, 2022, the trial court entered default judgment against Appellants. At no time prior to the entry of default judgment was a Rule 60(b) motion seeking to set aside a default judgment appropriate.
- On March 10, 2022, Appellants filed, *inter alia*, 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 ("App. Motion Reconsider/Alter"). That motion cited Rules 52(b), 55(c), 59(e) and 60(b)(1) of SCRCP and 1) properly asked for relief from the entry of default for good cause shown and 2) properly asked for relief from the entry of default judgment due to "mistake, inadvertence, surprise, or excusable neglect." In addition to this motion,

Appellants filed a Memorandum in Support of Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment which cited Rules 52(b), 55(c), 59(e), 60(b)(1) and 60(b)(5) of SCRCP. No hearing was held and no oral arguments were allowed on this motion; rather the Court issued a Form 4 Order denying Appellants' Motion to Reconsider.

c. Respondent contends that Appellants did not obtain a ruling on whether their conduct constituted excusable neglect, that Appellants failed to move under Rule 59(e) for reconsideration of the "excusable neglect" standard as relief from default, and that they "failed to preserve any argument that "excusable neglect" standard should apply to the questions of setting aside the default."

Respondent's contention lacks merit for the following reasons:

- Respondent's contention that Appellant did not obtain a ruling on whether their conduct constituted excusable neglect is incorrect. See the trial court's Form 4 Order, dated August 1, 2022 which expressly denied the March 10, 2022 App. Motion Reconsider/Alter, as well as other motions, based on substantive grounds.
- Respondent again confuses the rules, applicable standards, and the procedural history of this case as they apply to setting aside an entry of default versus setting aside a default judgment. On March 10, 2022, Appellants filed, *inter alia*, App. Motion Reconsider/Alter. That motion cited Rules 52(b), 55(c), 59(e) and 60(b)(1) of SCRCP and 1) properly asked for relief from the entry of default for good cause shown and 2) properly asked for relief from the entry of default judgment due to "mistake, inadvertence, surprise, or excusable neglect."
- By its March 10, 2022 App. Motion Reconsider/Alter, Appellants preserved both arguments; specifically that relief from the Entry of Default should have been granted under the "good

cause" standard, and that relief from the Default Judgment (as it relates to the default status of Appellants) should have been granted under the "excusable neglect" standard.

By Section I. A. 2, Respondent contends that Appellants can demonstrate neither good cause nor excusable neglect. In support of that contention, Respondent regurgitates the procedural history of the Entry of Default and then discusses Ward's Affidavit in Support of Defendants' Motion to Set Aside Entry of Default Pursuant to SCRCP 55(c). (Ward Affidavit II).

Respondent's contention lacks merit for the following reasons:

- Ward Affidavit II expressly discusses communications that Ward was having with general counsel for Hanover, the surety that had issued the Labor and Material Performance Bond for the project, that pursuant to those discussions, Appellant Restoration Specialists had made direct payment to several subcontractors, that Appellant Restoration Specialists continued to have discussions with Hanover, that when he received the Summons and Complaint for the instant action, he thought it was related to his arrangements with Hanover, and that he is not an attorney and did not understand that the instant action was separate and apart from the bond claims that he was working directly with Hanover and its general counsel to address.
- Further, in commencing this action, Respondent served Appellants with the Complaint, which (a): asserted claims commensurate with those involved in Appellant's ongoing arrangements and discussions with Hanover and (b): attached the subcontract containing the mandatory arbitration provisions as an exhibit thereto. Contemporaneous with the service of the Complaint, Respondent served Appellants with Respondent's Motion to Stay and Compel, which motion expressly requested the court to stay the very action contemporaneously served upon Appellants (including the claims asserted against them in the Complaint) and compel arbitration. The Respondent's Motion to Refer to the Master in Equity and for Entry of Default,

with attached Affidavit of Default, noticeably fails to inform the trial court of Respondent's Motion to Stay and Compel and service of same upon Appellants. (*Motion to Refer to the Master in Equity and for Entry of Default; Affidavit of Default).*

- Further, Respondent's Complaint expressly cited the Indemnity Agreement binding all parties in relation to a payment bond for the project. The Indemnity Agreement expressly states that "[t]he Indemnitors waive and subordinate all rights of indemnity, subrogation and contribution each against the other until all obligations to the Surety have been first satisfied in full", further evincing the understanding by Appellants upon service of the pleadings upon them that all parties were prohibited from asserting claims against each other until all obligations to the Surety which Appellants were discussing with Hanover were satisfied in full. (Indem. Agmt.)
- Appellants have demonstrated good cause and/or excusable neglect entitling them to relief from default in this matter. *See Initial Brief of Appellants, Section I.*

By Section I.A.3, Respondent contends that Appellants do not have a meritorious defense and that "it has no way to respond to the nebulous incorporation by Appellants of 'all additional defenses asserted by Appellants in support of its efforts to lift then 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." Further, by Fn 8, Respondent expressly accuses Appellants of trying to "circumvent the Court's order (denying Appellants' motion to exceed the page limit for their initial brief) by incorporating reems of arguments made in prior filings.

Respondent's contentions lack merit for the following reasons:

- Respondent's reference to the alleged "nebulous incorporation of "all additional defenses asserted by Appellants" is a red herring. Appellants' arguments regarding meritorious defenses have been specifically identified, and supported by authority and arguments presented in

certain motions, legal memoranda and oral arguments throughout this litigation, including this appeal. These authorities and arguments are specifically identified, indexed and contained in the record on appeal for the appellate court's consideration. Furthermore, the identification of these specific arguments and when they were made are material to the controlling factors to be applied under a Rule 55(c) and Rule 60(b) default analysis. Finally, Respondent's inflammatory accusation of an alleged attempt by Appellants to circumvent the Court's order by referring to arguments made in prior filings is frivolous, defies the record on appeal and is utterly lacking in evidentiary support or legal precedent.

- Appellants' meritorious defenses are identified and set forth within Appellants' Initial Brief. Specific issues with Respondent's argument contained within subparagraphs a. through e. are discussed below.
- Subparagraph a. (*The Arbitration Provision*): Respondent's reliance on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346 (1985) is misplaced. First, the *Mitsubishi* case did not involve the question of default. Second, Respondent's parenthetical summary of the *Mitsubishi* court's holding relating to arbitration is incomplete and taken wholly out of context. In fact, the explicit statement of **the *Mitsubishi* court was that "[b]y agreeing to arbitrate a statutory claim, a party does not** forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.,* 473 U.S. at 628. In short, the invocation of default against the Appellants as occurred herein forecloses them from asserting defenses they otherwise would be allowed to assert in the arbitral forum.
- Subparagraph b. (*Appellant's Assertion that PCG was Overpaid*): Respondent's breach of contract cause of action seeks payment for Respondent's alleged work under the subcontract.

Obviously, if Respondent was overpaid for its work, Appellant's defense of overpayment would be a defense to Respondent's claim for breach of contract for failure to pay for work performed under the subcontract. Concerning Appellant's assertion that PCG was overpaid, the Subcontract was a stipulated sum subcontract and PCG was paid more than the stipulated sum amount. RS overpaid PCG by more than $14,000.00. (Jan 31, 2022 Hearing Tran. At 71, ln. 12 – 75, ln. 5). *See also Initial Brief of Appellant, Section I.D.(3) and V.C.*

- Subparagraph c. (*Profit Sharing*): Respondent introduces this section of its Initial Brief by improperly and without foundation alleging that Appellants were "thieves that stole money paid by the VA." This accusatory, inflammatory and defamatory language is highly inappropriate in Respondent's brief. What is appropriate, however, is a recognition of the fact that Respondent's breach of contract cause of action seeks payment for an alleged split of profits under the subcontract. Obviously, if no profit-sharing agreement existed between the parties, Appellants' defense of a lack of profit-sharing agreement would be a defense to Respondent's claim for breach of contract for non-payment of profits. Concerning Appellant's assertion that no profit-sharing agreement existed, Appellant craves reference to the (a): Initial Brief of Appellant, Section I.D.(3) and V.C. (b) Reply Brief of Appellants, Section I.C.
- Subparagraph d. (*Waiver of Consequential Losses*): Once again, Respondent introduces this section of its Initial Brief by improperly and with no foundation alleging that Appellants are liable for "stealing money from the Government to the detriment of PCG." This offensive, accusatory, inflammatory and defamatory language is again highly inappropriate in Respondent's brief. Respondent's Complaint attached and incorporated the Teaming Agreement into its Complaint. The Complaint included, *inter alia*, causes of action for negligent misrepresentation and constructive and actual fraud and sought consequential

damages. Respondent also sought consequential damages at the damages hearing. Tr. 107: 7-20. Obviously, the waiver of indirect, special or consequential losses in contract, tort or otherwise under the Teaming Agreement would be a defense to any causes of action in the Complaint seeking such damages.

- Subparagraph d. (*Legal or Equitable Indemnity*): Respondent concludes this section of its Initial Brief with the same offensive, accusatory, inflammatory, and defamatory language previously referenced in prior sections of its brief. The limited argument it does make is limited to one single aspect of Appellant's defenses (waiver under the Indemnity Agreement) to Respondent's claim for legal and equitable relief. Appellant asserts numerous defenses to Respondent's for legal and equitable relief, all of which were preserved and asserted on numerous occasions in legal memoranda, at the damages hearing and under post-trial motions. With respect to the express language of the Indemnity Agreement, it indicates that "the indemnitors waive and subordinate all rights of indemnity, subrogation, and contribution, each against the other until all obligations to the surety have been first satisfied in full." The obligations of PCG had not been satisfied in full at the time of the damages hearing. (Tr. 83: 20 – 84 Ln 7.) *See also Initial Brief of Appellant, Section V.C.*
- Subparagraph e. (*Summary*): In response, Appellants crave reference to Appellants' responses above as well as the Initial Brief of Appellants, Section I.D.(3) and V.C.

By Section I.A. 4., Respondent again contends that Appellant's Motion for Reconsideration of the Motion to Set Aside the Entry of Default (filed on July 27, 2016), is not preserved for appeal because Rule 60(b) was not argued in that motion.

Respondent's contentions lack merit for the following reasons:

- Respondent continues to confuse the rules, applicable standards, and the procedural history of this case as they apply to setting aside an entry of default versus setting aside a default judgment. Here, Respondent's argument is nonsensical. Rule 60(b) was not applicable to the July 27, 2016 Motion to Reconsider the trial court's denial of the Motion to Set Aside Entry of Default. Respondent's Motion to Set Aside Entry of Default was based on SCRCP 55(c) and sought to set aside the ***Entry of Default*** (emphasis added). **(**Appellant June 3, 2016 Motion, & July 14, 2016 Memo)**.** The trial court denied Appellants' Rule 55(c) motion and Appellants sought reconsideration of that order under Rule 59(e) on July 27, 2016. Insomuch as there had been no default judgment entered on July 27, 2016, Rule 60 was not applicable in the related Motion to Reconsider seeing to lift the **Entry of Default**. (Mot. to Reconsider).

B. The Master Committed Error By Entering Default Judgment Against All Defendants.

Respondent contends that Appellant's argument that PCG's Complaint was insufficient to establish liability on PCG's claims fails insomuch as it "cit[ed] scant case law from South Carolina and rel[ies] instead on a case from Georgia and an unreported case from federal court in Alabama." Respondent's contentions lack merit for the following reasons:

- The cited authorities from South Carolina and other jurisdictions are consistent and all employ the well-established legal precedent that only the well-pleaded allegations of a complaint are deemed admitted upon default. *See Initial Brief of Appellants, Section V.B.*
- Additional legal authorities from South Carolina and jurisdictions employing the well-pleaded complaint principle support this proposition and establish that PCG's Complaint was insufficient to establish liability on PCG's claims. For example, the Court of Appeals of South Carolina has previously held that "[a] party seeking default judgment is entitled to only such relief as is framed by his pleading…It follows that if a complaint fails to state a cause of action,

the rendering of a default judgment thereon is without authority of law and therefore **reversible error**. [(emphasis added)]. An objection that the complaint does not state facts sufficient to constitute a cause of action is not waive by a default." *Masters v. Rodgers Dev. Grp.,* 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984 (citing *Mutual Savings & Loan Association v. McKenzie,* 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980); *Gadsden v. Home Fertilizer & Chemical Co.,* 89 S.C. 483, 72 S.E.15 (1911)); *see also, e.g., Direct TV, Inc. v. Pernites,* 200 Fed. App'x 257, 257 (4th Cir. 2006) (vacating default judgment on claims that were not well pleaded in the complaint); *Alan Neuman Prods., Inc. v. Albright,* 862 F.2d 1388, 1392-93 (9th Cir. 1988) (overturning default judgment based on failure to properly plead fraud under RICO); *Nishimatsu Constr. V. Houston Nat'l Bank,* 55 F.2d 1200, 1206 (5th Cir. 1975) (vacating default judgment that was based on complaint that failed to state a cause of action). As raised and discussed at the damages hearing, in Appellants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment and in the Initial Brief of Appellants, Respondent's Complaint is woefully deficient and fails to state facts sufficient to constitute certain causes of action upon which the trial court granted default judgment. Accordingly, the trial court's rendering of a default judgment is reversible error and the default judgment must be vacated.

Respondent further contends that Appellants fail to note ***how*** PCG's Complaint is deficient.

Respondent's contentions lack merit for the following reasons:

- Appellants expressly raised/addressed the deficiencies of PCG's Complaint at the damages hearing. *See* Hearing Transcript at 112: 20 – 121:19.
- Appellants expressly addressed the deficiencies of PCG's Complaint in its 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 providing the trial court with a detailed spreadsheet citing these deficiencies. *See* Ex. C to App. Motion Reconsider/Alter.

C. The Award of Damages Under the Default Judgment was Improper

Respondent contends that the Master's award of damages was supported by the evidence.

Respondent's contentions lack merit for the following reasons:

- *Alleged Subcontract Balance & Share of Profits – See Initial Brief of Appellants, Section V.(C) & (D).* Also, Respondent relies on the testimony of a single witness that is a former employee of PCG that is contrary to the written subcontract between Respondent and Appellant Restoration Specialists, LLC to support its claims and damages related to purported funds due under the subcontract and a purported profit split. These damages are not supported by the express terms of the subcontract.
- *Alleged Indemnity – See Initial Brief of Appellants, Section V.(F).* Also, Respondent relies on a statement in the Indemnity Agreement to purportedly support the Court's finding that Appellants are liable for funds related to indemnification to Hanover. However, Respondent ignores the statement in the Indemnity Agreement that states that "the indemnitors waive and subordinate all rights of indemnity, subrogation, and contribution, each against the other until all obligations to the surety have been first satisfied in full." The obligations of PCG had not been satisfied in full at the time of the damages hearing. (Tr. 83: 20 – 84 Ln 7.)
- *Alleged Lost Profits* - Respondent indicates that the Master did not award PCG the $250,000 requested in lost profits "as a result of being forced out of business by Appellants' actions." Respondent is correct that the Master properly did not award lost profits to PCG as Respondent failed to carry its burden on this claim at the damages hearing. However, the quoted portion

of Respondent's statement (i.e., that Respondent was "forced out of business by Appellants' actions") is a bald assertion by counsel, unsupported by evidence and directly contrary to the findings of the Master on this issue.

- *Alleged Attorneys Fees* - Respondent indicates that the Master did not award PCG the $29,5645.91 (sic) in attorneys' fees . . .brought after PCG failed as a result of Appellants' actions. . ." Respondent is correct that the Master properly did not award attorneys fees to PCG as Respondent failed to carry its burden on this claim at the damages hearing. However, the quoted portion of Respondent's statement (i.e., that "PCG failed as a result of Appellants' actions") is another bald assertion by counsel, unsupported by evidence and directly contrary to the findings of the Master on this issue.
- *Alleged Prejudgment Interest* - In footnote 12, Respondent acknowledges that prejudgment interest was not pled in the Complaint. Respondent attempts to cure this defect by alleging that the failure to plead prejudgment interest in its Complaint, therefore barring recovery and award, is not preserved for appeal. Respondent cites *Johnson v. Sonoco Prods. Co.,* 381 S.C. 172, 672 S.E.2d 567 (2009) in support of the proposition that the issue has not been preserved because it was raised for the first time in Appellant's Motion to Reconsider. However, the *Johnson* holding and the underlying precedent on which it is based (i.e., *Commercial Credit Loans, Inc. v. Riddle,* 334 S.C. 176, 512 S.E.2d 123 (Ct. App. 1999) apply their holdings to Rule 59(e) motions. In the present case, this issue was raised in App. Motion Reconsider/Alter pursuant not only to Rule 59(e), but also under Rule 52, which does preserve this matter for appeal, and the Master's Order ruling on Appellants' motion indicates that it was decided on substantive grounds. (Motion, Order)

- In footnote 12, Respondent further alleges that had this issue "been raised by the trial court", it could have moved to amend the complaint to conform to the evidence and specifically requested prejudgment interest pursuant to Rule 15(b), SCRCP. However, Appellant did not consent to the trial of this issue and Respondent has at no time, including after the issue was raised in Appellants' Rule 52 motion, moved to amend its complaint to address this defect in its pleading under Rule 15(b).
- As to Respondent's arguments alleging entitlement to prejudgment interest on monies allegedly owed for work under the subcontract and indemnity on the amount of the surety claims, Appellants crave reference to and assert the arguments and authorities refuting Respondent's claim for prejudgment interest in the Initial Brief of Appellants, Section V.(F) and Defendants' Motion to Reconsider and to Alter, Amend or Relieve Defendants from the Court's Order Denying Defendants' Motion to Dismiss and Entering Default Judgment, Section II.(G), which motion is cited, indexed and contained in the record on appeal.

D. Respondent Is Silent as to Appellants' Argument that $493,922.78 Should Not Have Been Included in the Damages Award Against Appellants Mark Ward and Lynette Ward

Respondent is silent to Appellants' argument that the awards related to the subcontract balance, profit split and associated interest should not have been included in the damages award and entry of judgment against the individuals, Appellant Reuben Mark Ward and Lynette Pennington Ward. (Initial Brief at G; Ex B, App. Motion Reconsider/Alter). Accordingly, Appellants' reassert this argument and request that the Court order this reduction in the entry of judgment, as alternative relief in the event the default judgment is not vacated in its entirety.

III. THE MASTER ERRED IN FAILING TO DISMISS THIS ACTION ON THE BASIS OF RESPONDENT'S TERMINATION DURING THE COURSE OF THIS LITIGATION

Respondent asserts procedural and substantive arguments claiming Appellants' Motion to Dismiss under Rule 12(b)(1) was properly denied by the Master.

Respondent's contentions lack merit for the following reasons:

- Appellants incorporate and crave reference to its arguments advanced in the Initial Brief of Appellants, Section III.(A), 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. The referenced motion, memorandum and oral arguments are all identified, indexed and contained in the record on appeal for the court's review and consideration.

IV. THE MASTER'S DENIAL OF APPELLANTS' MOTION TO EXCLUDE AND STRIKE WAS AN ABUSE OF DISCRETION

A. Appellants Did Argue that the Master Abused His Discretion

In its Introduction to Section III and here, Respondent purports that Appellants did not argue that the Master abused his discretion and cites Appellants' Initial Brief at 34-39.

Respondent's contentions lack merit for the following reasons:

- Respondent's argument is nonsensical. On Page 34 of Appellants' Initial Brief, Appellants provide the standard of review: "abuse of discretion". On Page 35 of Appellants' Initial Brief, Appellants state that "[t]he 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…"

B. The Materials in Question *Are Not* in Evidence

Respondent alleges that the materials in question are in evidence based on a partial quote contained in Appellants' Initial Brief.

Respondent's contentions lack merit for the following reasons:

- As is Respondent's habit, here it takes piecemeal information from a partial quote of Appellants and attempts to contort it to support its position. In full context, the quote reads: "various documents designated and attached as "exhibits" in Respondent's two Notices of Filing Trial Exhibits ("Notices") . . . and admitted into evidence over Appellants' evidentiary objections at the default damages hearing ***and post-trial Motion to Exclude and Strike***. . .
- First, it is the Respondent who designated and labeled the documents attached to its Notices filed the day after the damages hearing as "exhibits". Appellants did not and never have accepted Respondent's nomenclature or characterization of these document as "exhibits". Appellants have timely and continuously challenged Respondent's claim that these documents were admitted into evidence at the damages hearing, in Appellants' post-trial Motion to Exclude and Strike and on appeal and they are not bound by Respondent's unilateral designation of such documents as "exhibits" entered into evidence.
- The Respondent itself admits that it "cannot discount the possibility that the materials were not formally moved into evidence…[at the damage hearing]". (*Plaintiff's Opposition to Defendants' Motion to Strike or Exclude, Pg. 1*). Indeed, Respondent filed Notices with the Clerk of Court post-trial requesting these materials be filed in the court record as "exhibits" and later requested the Court to reopen the hearing to admit these items into evidence if necessary.

Respondent alleges that a review of the hearing transcript reveals that the documents were properly identified and authenticated by the witness and cites one example at the Transcript 44:16-4.

Respondent's contentions lack merit for the following reasons:

- Respondent again takes piecemeal information and attempts to contort it to support its position. The testimony here is inadequate to identify and authenticate this highly prejudicial document or any document for that matter. *See also* Ex. B, App. Motion Reconsider/Alter; App. Motion to Exclude and Strike and Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Exclude and Strike.

Respondent alleges that the Master's decision to treat the "exhibits" as admitted does not approach the "manifest abuse of discretion" or "probable prejudice" required for reversal.

Respondent's contentions lack merit for the following reasons:

- Contrary to Respondent's conclusory statement, the Master's reliance upon these documents in support of his findings of fact and conclusions of law inflicts great prejudice upon the Appellants in rendering a multi-million dollar default judgment against Appellants in error and without authority of law.

V. APPELLANTS HAVE NOT WAIVED THEIR RIGHT TO ARBITRATION AND THE COURT ERRED IN FAILING TO STAY THIS ACTION AND COMPEL ARBITRATION

Respondent alleges that Restoration could not compel arbitration because it was in default.

Respondent's contention lacks merit for the following reasons:

- On March 10, 2021, the Court of Appeals of South Carolina issued its opinion in this case finding that the Master's order refusing to set aside the entry of default was not immediately appealable and addressing Appellants' argument that they did not waive their right to arbitration. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC,* 428 S.C. 261, 834 S.E.2d 204 (Ct. App. 2019). Thereafter, upon Writ of Certiorari, the South Carolina Supreme Court issued its opinion affirming the decision of the court of appeals as modified. *Palmetto Constr. GRP., LLC v. Restoration Specialists, LLC,* 432 S.C. 633, 856 S.E.2d 150 (2021). Specifically, the Supreme Court found that the court of appeals correctly

determined the order refusing to set aside the entry of default was not immediately appealable, but that the court of appeals erred in addressing the defendants' argument they did not waive their right to arbitration. On the issue of waiver, the Supreme Court held that:

> "[i]n the context of default, the concept of waiver is bound up in the Rule 55(c) determination of good cause and Rule 60(b) determinations such as excusable neglect. On appeal from a final judgment, the defendants may challenge any such determinations, and if that challenge is successful, may claim they did not in fact waive their contractual right to arbitration."

The above standard appears to bind the longstanding federal and South Carolina jurisprudence on waiver (and presumably the elements of proof necessary to establish waiver) with the South Carolina jurisprudence on default. As such, Appellants submit that the totality of the facts and circumstances of the case must be considered to determine the issue of waiver and, when considered in the present case, such facts and circumstances do not establish waiver. Furthermore, the totality of the facts and circumstances applied to South Carolina's default jurisprudence Rule 55(c) and Rule 60(b) establish Appellants entitlement to a lifting of the entry of default under Rule 55(c) and a setting aside of the default judgment under Rule 60(b). Moreover, the default judgment should be vacated on the additional grounds set forth in herein and in the Initial Brief of Appellants.

- Respondent mistakenly argues Appellants chose to file a claim for arbitration to remove their default status. In fact, Appellants chose to file a claim for arbitration to assert their contractual right to arbitration, as agreed to by the parties and expressly requested by Respondent in its Motion to Stay and Compel upon commencement of this action.
- Respondent mistakenly argues that admission by default of the allegations in the complaint that jurisdiction was vested in the trial court and that venue was proper constitutes an

"emphatic repudiation" of the right to compel arbitration. In fact, if this were the case, Respondent's Motion to Stay and Compel would have been improper in light of the application of Respondent's own allegations to its motion demanding arbitration. Furthermore, these allegations do not allege a waiver of arbitration. Finally, any application for arbitration by either party would not divest the court of jurisdiction; instead, it would simply stay the court action and allow arbitration to proceed. The court would thus maintain jurisdiction over the case.

- The cases cited by Respondent in support of its argument that the failure to raise arbitration as an affirmative defense waives the right to arbitration are distinguishable from this case and do not constitute binding or persuasive authority on this issue. Respondent's cases are distinguished in subparagraphs (1) – (7) below and additional comparative and persuasive authorities in the context of a default judgment are provided in subparagraph (8) below:

- (1) *Wham v. Shearson Lehman Brothers, Inc.,* 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) (The *Wham* court expressly acknowledged that it limited its opinion to the Rule 55(c) analysis in relation to an entry of default and did not address the master's denial of defendant's motion to compel arbitration, including any legal standard invoked by the master in denying the motion).;

- (2) 5 Am. Jur. 2d *Arbitration & Award §* at 556-557 (This 5 Am Jur. 2d section does not cite to any South Carolina legal authorities. Further, the arbitration defense it references refers to the defense of "arbitration and award", which defense is expressly adopted in Rule 8(c), SCRCP and limited to the situation where a dispute already has already been arbitrated and an award obtained. Neither of these events have occurred in this case.);

- (3) *Partain v. Upstate Auto Grp.,* 386 S.C. 488, 689 S.E.2d 602 (2010) (The labeling of defendant's arbitration agreement as an affirmative defense was simply the nomenclature chosen by defendant in its pleading; not a legal finding of the court. Furthermore, the sole legal issue before the court was whether the plaintiff's claims were within the scope of the arbitration agreement. The *Partain* case in no way holds that arbitration an affirmative defense that is waived if not pled.);

- (4) *Howard v. S.C. Dept. of Highways,* 343 S.C. 149, 538 S.E.2d 291 (Ct. App. 2000) (The *Howard* case does not concern arbitration issues; instead, it concerns the defense of assumption of the risk.);

- (5) *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat,* 289 F.3d 434 (6th Cir. 2002) (The *Gen. Star* case is a 6th Circuit case arising out of an appeal from the US District for the Southern District of Ohio. The delay and prejudice forming the basis of the *Gen Star* court's decision finding waiver of arbitration are extremely distinguishable from the present case – specifically, in *Gen Star* the defendant did not asset its right to arbitration until 17 months after receiving notice of the lawsuit and 1 year after the entry of default judgment.);

- (6) *Sundown Operating Co. v. Intedge Indus., Inc.,* 383 S.C. 601, 681 S.E.2d 885 (2009) (The *Sundown* case simply sets forth the standard for relief under Rule 55(c), SCRCP. It in no way concerns arbitration, nor holds, as Respondent claims, that to regain the right to arbitration after default, one must present good cause for the default to be lifted.)

- (7) *Howard v. Holiday Inns., Inc.,* 271 S.C. 238, 246 S.E.2d 880 (1978) (The *Howard* case does not concern arbitration issues; instead, it was an action for conversion of an automobile and the court's ruling concerned the issue of setting aside default and plaintiff's failure to present proof supporting a default judgment).

- By comparison, Appellants crave reference to the cases of *Cedar Surgery Center v. Bonelli,* 96 P.3d 911, 2004 UT 58 (Utah 2004) and *International Fidelity Insurance Co. v. BMC Contractors, Inc. et al*, Case 5:06-cv-00186 (CAR) (Filed 07/14/09) both of which provide persuasive holdings finding no waiver of arbitration in the context of a default judgment under standards of waiver similar to South Carolina and federal law waiver standards.

- Respondent's claim of prejudice lacks merit for the reasons set forth in the Initial Brief of Appellant. *See*, *Initial Brief of Appellant, Sections I.(D)(4) and II.(E)(2)*. Also, Respondent's newly asserted claims of prejudice contained in its Initial Brief lack merit for the following reasons: (a) Respondent failed to carry its burden to prove Respondent's claim that "PCG went out of business as a result of Restoration's wrongdoing" and the Master expressly denied Respondent's claim for lost profits as damages under this claim; (b) Respondent presented no evidence in support of its bald allegation that it was unable to obtain bonds in the future as a result of Appellants' actions (once again defamatorily and improperly referred to as Restoration's stealing of funds); (c) Respondent presented no evidence in support of its bald and vague allegation that "Appellants' delays…cost PCG and its owners everything" and that "[t]he business is defunct [(which is contrary to its

arguments in opposition to Appellants' Motion to Dismiss under 12(b)(1)] and the owners were ruined."; (d) Respondent's citation to *Champion v. Whaley,* 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) for the proposition that the lack of prejudice in the record is due to Appellants' conduct in this action is misplaced as: (1) that case had nothing to do with arbitration and (2) Respondent had multiple opportunities throughout this case to present evidence of prejudice in the form of sworn affidavits, testamentary and documentary evidence, and/or proffers to the court, if such prejudice existed, including submission of such proof in Respondent's motions and legal memoranda filed with the trial court and/or appellate courts, at the hearings before the Master, during Respondent's proffer of information at the Master's October 4, 2016 hearing, and at the damages hearing before the Master. Despite the Respondent's multiple opportunities to present evidence of prejudice, Respondent failed to do so.

CONCLUSION

For the grounds and reasons set forth herein and in the Initial Brief of Appellants, the lower court's rulings appealed here should be reversed, Appellant's Motion to Reconsider should be granted and the relief requested therein granted.

Respectfully submitted,

LAW OFFICE OF A. BRIGHT ARIAIL, LLC

s/ A. Bright Ariail_____
A. Bright Ariail
SC License #69570
125 Wappoo Creek Drive
Building E, Suite 202 Charleston, S.C. 29412
P: (843) 814-8805 / F: (843) 266-0538
ATTORNEY FOR APPELLANTS

April 24, 2023
Charleston, South Carolina

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

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

---

PROOF OF SERVICE

The undersigned hereby certifies that on the 24th day of April, 2023, I served the Reply Brief of Appellants 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:

Jann G. Rannik
Epting & Rannik, LLC
46A State Street
Charleston, South Carolina 29401
jgr@epting-law.com

Michelle N. Endemann
497 St. Andrews Blvd.
Charleston, SC 29407
mendemann@clarksonwalsh.com

April 24, 2023

s/A. Bright Ariail

A. Bright Ariail
SC License #69570
Law Office of A. Bright Ariail, LLC
125E Wappoo Creek Drive, Suite 202
Charleston, SC 29412
843/814-8805
Attorney for Appellants

Law Office of A. Bright Ariail, LLC

April 24, 2023

RECEIVED
Apr 24 2023
SC Court of Appeals

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.*
Appellant 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. Reply Brief of Appellants;
2. Proof of Service of the Reply Brief of Appellants.

Be advised that there has been no change in Appellants' Designation of Matter to be Included in the Record on Appeal from that filed on December 22, 2022 with the Initial Brief.

By copy of this letter, I am servicing opposing counsel with same.

Thank you for your assistance.

With kindest regards, I am

Sincerely yours,

s/ Bright Ariail

A. Bright Ariail

Enclosures

bright@brightariaillaw.com 125E Wappoo Creek Drive Suite 202 Charleston, SC 29412 843/814-8805

cc: Jaan Ranick, Esquire
Michelle Endemann, Esquire

bright@brightariaillaw.com 125E Wappoo Creek Drive Suite 202 Charleston, SC 29412 843/814-8805