IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC,.....*Respondent*,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and
Lynnette Pennington Ward, ...*Appellants*.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iii**

STATEMENT OF THE ISSUES ON APPEAL **1**

STATEMENT OF THE CASE **1**

A. Complaint and Default Order 1

B. First Appeals 2

C. Damages Hearing 3

STATEMENT OF THE FACTS **3**

ARGUMENT **5**

I. APPELLANTS WERE PROPERLY HELD IN DEFAULT, AND DEFAULT JUDGMENT WAS PROPERLY ENTERED AGAINST ALL DEFENDANTS IN A PROPER AMOUNT **6**

A. The Master's Denial of Restoration's Motion to Be Relieved from Default Was Not Error, Let Alone Abuse of Discretion. 6

1. The "Good Cause" Standard Applies to the Requests for Relief from Default. *7*

a. Excusable Neglect Standard Was Not Raised on Reconsideration of the Denial of the Motion to Set Aside Default. 7

b. Appellants Made No Argument to the Trial Court at Any Time as to Why Their Conduct Constituted Excusable Neglect. 7

c. Appellants Did Not Obtain a Ruling on Whether Their Conduct Constituted Excusable Neglect. 8

2. Appellants Can Demonstrate Neither Good Cause Nor Excusable Neglect. *9*

3. Appellants Do Not Have a Meritorious Defense. *11*

a. The Arbitration Provision. 12

b. Appellants' Assertion that PCG was Overpaid 13

c. Profit Sharing 13

d. Waiver of Consequential Losses 14

d. Legal or Equitable Indemnity 14

e. Summary 14

4. Reconsideration of Order of Default. *15*

B. The Master Properly Entered Default Judgment Against All Defendants. 15

C. The Amount of Damages Awarded Was Proper. 16

1. Owing to PCG for its Work Under the Subcontract. *17*

2. PCG's Share of Profits *17*
3. Indemnity of PCG's Liability to Surety *17*
4. PCG's Lost Profits *18*
5. PCG's Attorney's Fees *18*
6. Prejudgment Interest *18*
II. RESTORATION'S MOTION TO DISMISS WAS PROPERLY DENIED 19
A. Procedural Grounds 20
B. Substantive Grounds 20
1. PCG Did Not Terminate its Existence. *20*
2. PCG Properly Corrected the Record and Is Not Estopped From Contesting the Motion *21*
C. Reconsideration 22
III. THE MASTER'S DENIAL OF APPELLANTS' MOTION TO EXCLUDE AND STRIKE WAS NOT AN ABUSE OF DISCRETION. 22
A. Appellants Failed to Argue the Master Abused His Discretion 23
B. The Materials in Question *Are* in Evidence 23
C. The Master Did Not Abuse His Discretion 24
D. Reconsideration 24
IV. RESTORATION COULD NOT COMPEL ARBITRATION BECAUSE IT WAS IN DEFAULT 25
A. A Party in Default Cannot Seek Affirmative Relief 25
B. A Party in Default Has Admitted the Allegations in the Complaint 26
C. Failure to Raise Arbitration as an Affirmative Defense Waives the Right 27
D. Prejudice 28
CONCLUSION 29

TABLE OF AUTHORITIES

Cases

ABB, Inc. v. Integrated Recycling Grp. of SC, 432 S.C. 545, 854 S.E.2d 171 (Ct. App. 2021) ... 23

Belle Hall Plantation Homeowner's Association, Inc. v. Murray, 419 S.C. 605, 799 S.E.2d 310, (Ct. App. 2017) ... 7, 9

Bland v. Green Acres Grp., 12 So.3d 822 (Fla. App. 2009) ... 27

Butler Contracting, Inc. v. Ct. St., LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) ... 18

Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) ... 29

Dixie Bell, Inc. v. Redd, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007) ... 19

Estate of Tenney v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 100, 712 S.E.2d 395 (2011) ... 16

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) ... 6, 8

Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434 (6th Cir. 2002) ... 27

Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) ... 27, 28

Howard v. S.C. Dept. of Highways, 343 S.C. 149, 538 S.E.2d 291 (Ct. App. 2000) ... 27

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) ... 20

Johnson v. Sonoco Prods.Co., 381 S.C. 172, 672 S.E.2d 567 (2009) ... 18

Langehans v. Smith, 347 S.C. 348, 554 S.E.2d 681 (Ct. App. 2001) ... 6, 8, 11

Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) ... 28

Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020) ... 23, 24

McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) ... 12

McMillan v. S.C. Dep't of Agriculture, 364 S.C. 60, 611 S.E.2d 323 (Ct. App. 2005) ... 19

Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988) ... 7

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346 (1985) ... 12

Palmetto Constr. Grp v. Restoration Specialists, LLC, 432 S.C. 633, 856 S.E.2d 150 (2021) ... passim

Palmetto Constr. Grp. v. Restoration Specialists, LLC, 428 S.C. 261, 834 S.E.2d 204 (Ct. App. 2019) 2, 25

Parrish v. Allison, 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007) 16

Partain v. Upstate Auto Grp., 386 S.C. 488, 689 S.E.2d 602 (2010) 27

Pilkington v. McBain, 274 S.C. 312, 262 S.E.2d 916 (1980) 16

Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009) 6

Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998) 25, 26

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) 28

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) 9, 27

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) 8, 9, 12, 15

Statutes

S.C. Code § 33-44-207(c) 22

S.C. Code § 33-44-805(a) 21

S.C. Code § 34-31-20(a) 19

Rules

Rule 102, S.C.R.E. 24

Rule 220(c), S.C.A.C.R. 16, 20

Rule 55(c), SCRCP 7

Rule 59(g), S.C.R.C.P. 22

Treatises

5 Am. Jur. 2d *Arbitration & Award* § 51 27

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Master abused his discretion in declining to set aside default when Defendants were personally served, failed to answer, and failed to present good cause why the default should be lifted.

2. Whether the Master erred in denying Appellants' Motion to Dismiss when (i) the motion was made while Appellants were in default and (ii) was based on an unauthorized termination of the Respondent entity by an unaffiliated third party (iii) that was cured by Respondent prior to the hearing on Appellants' Motion.

3. Whether the Master erred in entering a default judgment against Appellants based upon considering the testimony and business records presented at the default damages hearing.

4. Whether the Master abused his discretion in declining to exclude contemporaneous documentary evidence and business records that were presented to and considered by the Master, the witness, and opposing counsel at the default damages hearing, and were filed on the record.

STATEMENT OF THE CASE

A. Complaint and Default Order

This matter arises out of Respondent Palmetto Construction Group, LLC's ("PCG's") February 12, 2016 complaint against Appellants alleging, *inter alia*, that Appellants—Restoration Specialists, LLC ("Restoration"), Mark Ward, and Lynette Ward ("Appellants")—misappropriated funds from a construction project for the Department of Veterans' Affairs ("VA"), failed to pay its subcontractors and suppliers, and defaulted on its agreements with PCG and the surety, Hanover Insurance Company ("Hanover"), leaving PCG responsible to its subcontractors and the surety for more than of $1.4 Million. (**R. p. 46**). Appellants were personally served with the summons and complaint on March 14, 2016, but failed to respond. (**R. pp. 100-05**). PCG moved to place Appellants in default on April 18, 2016, and Appellants were held in default and the matter was referred to the Master in Equity on April 21, 2016. (**R. p. 01**).

A damages hearing was set for June 6, 2016, and Appellants were properly served with notice thereof. (**R. p. 728**). On June 3, 2016, counsel appeared on behalf of the Appellants seeking a continuance of the damages hearing and relief from the default judgment. (**R. p. 119, 124**). Appellants later filed a motion to compel arbitration on July 11, 2016. (**R. p. 130**). After two hearings on the motions, the Master in Equity issued an order denying Appellants' motion to lift the default and finding that the arbitration motion was not properly before him as the Appellants were in default. (**R. p. 02**). The Master succinctly stated his ruling at the hearing: "Well, Ms. Ariail, I think the first thing you have to do is get out of default before you can bring affirmative relief." (**R. p. 577**). Appellants filed a motion to reconsider (**R. p. 165**), which was denied following a third hearing. (**R. p. 03**).

B. <u>First Appeals</u>

The default damages scheduled for October 4, 2016 hearing did not occur, because Appellants served a notice of appeal prior thereto, divesting the Master of jurisdiction. (**R. p. 504**). Appellants' first appeal was dismissed by this Court, however, because it was filed prior to the Master's entry of a written order. (**R. p. 05**). Appellants again appealed following entry of that order. (**R. p. 03, 509**). After briefing and oral argument, this Court dismissed the second appeal as premature, having been filed before entry of a default judgment, and finding Appellants had waived the right to arbitrate. **(R. p. 06**).[1]

After this Court denied reconsideration (**R. p. 13**), the Supreme Court granted certiorari and, while affirming this Court's dismissal of the appeal, held that it was premature to decide the issue of waiver of the right to arbitrate, as a party in default cannot move to compel arbitration.

[1] *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 428 S.C. 261, 834 S.E.2d 204 (Ct. App. 2019), *aff'd as modified,* 432 S.C. 633, 856 S.E.2d 150 (2021).

(**R. p. 14**)[2]. The Court therefore reasoned that it must first be determined if Appellants were properly in default before any question regarding arbitrability could be reached, and the propriety of default could only be considered following entry of a default judgment. (**R. p. 14**). The Supreme Court denied Appellants' subsequent petition for rehearing. (**R. p. 20**).

C. Damages Hearing

On April 21, 2021, before this matter was remitted to the Master on April 26, 2021 (*see* **Remittitur (R. p. 543)**), Appellants moved to dismiss on the basis that PCG had been terminated as an entity in the Secretary of State's Office, ending the case and controversy. (**R. p. 368**). That motion was heard on the day as the default damages hearing, January 31, 2022. The Master denied the motion to dismiss and ruled that PCG is entitled to a default judgment against Defendants in the amount of $2,338,958.64. (**R. p. 21 , 32**).

Following the damages hearing, Appellants moved to exclude or strike the documentary evidence PCG had provided to the Court and to which the witness had testified at the damages hearing, and which PCG filed after the hearing. (**R. p. 445**). The Master denied the motion. (**R. p. 37**).

Appellants moved to reconsider all of the Master's February 2022 orders (**R. p. 456**), but never sent copies of the motions to the trial court, as required by Rule 59(g). The motions were denied by the Master on substantive and procedural grounds. (**R. p. 40**). This appeal follows.

STATEMENT OF THE FACTS

Appellant Restoration was awarded a contract with the VA for completion of a parking

[2] *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), *reh'g denied* (Apr. 20, 2021) ("In this case, the simple fact the master refused to set aside the entry of default, thereby preventing the defendants from requesting the court to compel arbitration, does not mean the order was immediately appealable.").

garage for the VA facility in Augusta, Georgia (the "VA Project"). The contract between Restoration and the VA is dated March 29, 2012, though the project was delayed for several years before commencement. The total contract price was in excess of $8.1 Million. (**R. p. 853)**. Restoration was the general contractor on the VA Project, responsible for hiring subcontractors and obtaining a payment and performance bond. (**R. p. 853**). Appellant R. Mark Ward is the owner of Restoration, and Appellant Lynnette Pennington Ward is his wife. Restoration is a Georgia company. PCG is a South Carolina company who specialized in concrete work.

In November of 2011, Restoration entered into a Teaming Agreement with PCG. (**R. p. 1029**). The Teaming Agreement contemplated that Restoration and PCG would work together on multiple construction projects. Thereafter, Mr. Ward of Restoration approached PCG about working on the VA project as a concrete subcontractor, as well as in a supervisory capacity. Further, as Restoration was unable to secure the sizable bond the VA Project required, Mr. 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. (**R. p. 1035**).

Per the terms of the parties' agreement, PCG obtained the payment and performance bond from its surety, Hanover, Bond No. 9000-0045. (**R. p. 1051**). However, Hanover required that both PCG and Restoration, as well as their respective principals and their spouses sign an indemnity agreement, requiring them to indemnify Hanover for any sums it expends in paying claims made on the bond. (**R. p. 1053**).

The concrete work was performed by PCG, and as the Project neared completion, PCG asked that the parties meet to discuss the profit split provided for in the subcontract. (**R. p. 1067**). However, at this time PCG was alerted that several of Restoration's subcontractors had not

received payment. PCG too was owed over $180,000.00 pursuant to its own subcontract with Restoration. (**R. p. 1067 , 775**). It soon became apparent that multiple subcontractors were owed money, which Hanover was required to pay, in the amount of $1,425,144.00, and Hanover in turn made a demand under its indemnity agreement and upon the VA for the contract balance. (**R. p. 1068**). However, by this time Mr. Ward had collected over $8mm of the $8.1mm contract. (**See R. p. 1082, 853, 699**).

PCG filed suit, bringing multiple causes of action against Appellants to obtain the subcontract balance, PCG's share of the project profits, the funds to repay the surety, and other relief, as well as seeking an accounting to discover how Restoration Specialists had disposed of the funds intended for and owing to the subcontractors. Appellants refused to cooperate and were placed in default. As a result of Appellants' nonpayment of the subcontractors and the resulting claims on the surety bond, PCG lost its ability to obtain bonding for its work. It was forced out of business, and its principals—having personally guaranteed the bond—were ruined. (**R. p. 647-48).**

ARGUMENT

Given the somewhat tangled record now before this Court, PCG begins by listing of the orders Appellants have appealed:

1. Order filed July 16, 2016 (**R. p. 02**), denying:
    a. Appellants' Motion to Be Relieved from Default, and
    b. Restoration's Motion to Compel Arbitration;
2. Order filed November 2, 2016 (**R. p. 03**), denying Appellants' Motion for Reconsideration regarding the Motion to Set Aside Default;
3. Opinion (**R. p. 21**) and Form 4 order (**R. p. 32**) filed February 28, 2022:
    a. denying Appellants' Motion to Dismiss, and

b. entering Default Judgment;

4. Order filed February 28, 2022 (**R. p. 37**) denying Appellants' Motion to Exclude and Strike; and

5. Order filed August 1, 2022 (**R. p. 40**) denying Appellants' Motion for Reconsideration regarding (i) the Motion to Dismiss, (ii) the Entry of Default Judgment, and (iii) the Motion to Exclude and Strike.

PCG endeavors to address in an organized manner those arguments set forth in Appellants' brief.[3]

I. APPELLANTS WERE PROPERLY HELD IN DEFAULT, AND DEFAULT JUDGMENT WAS PROPERLY ENTERED AGAINST ALL DEFENDANTS IN A PROPER AMOUNT

A. The Master's Denial of Restoration's Motion to Be Relieved from Default Was Not Error, Let Alone Abuse of Discretion.

The Master's rulings holding Appellants in default and rendering a default judgment against them are reviewed for abuse of discretion and are not subject to reversal absent a *clear showing* of abuse of discretion. *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) ("The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. The trial court's decision will not be disturbed on

[3] As noted at various times herein, in lieu of presenting an argument to this Court, Appellants' brief at times simply incorporates all of Appellants' prior briefing in this matter. This is insufficient to raise an argument for this Court's consideration, as that requires citations to authority and supporting argument. *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) (noting "it is error for the appellate court to consider issues not properly raised to it").

The absence of argument in these instances complicates PCG's efforts to cogently respond, as PCG must first divine what portion of which prior brief contains the argument Appellants intend to make.

appeal absent a clear showing of an abuse of that discretion." (internal quotation omitted)); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). A trial court abuses its discretion when its ruling is based on an error of law or is grounded upon factual conclusions that are without evidentiary support. *Belle Hall Plantation Homeowner's Association, Inc. v. Murray*, 419 S.C. 605, 615, 799 S.E.2d 310, 315 (Ct. App. 2017) .

The Master rulings were based on neither an error of law nor unsupported factual findings and are not subject to reversal.

1. The "Good Cause" Standard Applies to the Requests for Relief from Default.

The South Carolina Rules of Civil Procedure provide: "For good cause shown the court may set aside an entry of default . . ." Rule 55(c), SCRCP. The Supreme Court noted in this matter that the "excusable neglect" standard of Rule 60(b) may apply to this question if argued in a motion for relief from judgment pursuant to that Rule. *Palmetto Constr. Grp v. Restoration Specialists, LLC*, 432 S.C. 633, 639–40, 856 S.E.2d 150, 153 (2021). However, Appellants failed to preserve this argument in three respects (*infra*), and thus "good cause" remains the applicable standard for purposes of this Court's review.

a. Excusable Neglect Standard Was Not Raised on Reconsideration of the Denial of the Motion to Set Aside Default.

Appellants did not cite Rule 60(b) nor advance any arguments pursuant thereto in their July 27, 2016 Motion to Reconsider the trial court's denial of the Motion to Set Aside the Default. *See* **Mot. (R. p. 165)** Accordingly, as to the issue of whether Appellants should be relieved from default, any argument that the "excusable neglect" standard applies was waived and is not preserved.

b. Appellants Made No Argument to the Trial Court at Any Time as to Why Their Conduct Constituted Excusable Neglect.

While Appellants' March 10, 2022 Motion to Reconsider the Entry of Judgment *does* cite Rules 60(b)(1) and (5), it advances no argument whatsoever as to how or why Appellants' neglect was "excusable." (**R. p. 457)**. It at no point explains how Appellants' failure to answer constitutes "excusable neglect." Instead, it baldly states:

> The Defendants should be relieved from the default damages hearing proceedings held on January 31, 2022 and the default judgment entered by the Court on February 28, 2022 should be set aside due to mistake, inadvertence, surprise, or excusable neglect.

(**R. p. 457**).[4] Simply citing a rule, or providing a formulaic recitation thereof, without advancing any argument as to why that rule should apply is insufficient to preserve the argument for appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." (internal citations omitted)). In order for an issue to be considered as having been "raised" to a court, authority must be presented and supporting arguments made. *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) (noting "it is error for the appellate court to consider issues not properly raised to it"); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.").

c. Appellants Did Not Obtain a Ruling on Whether Their Conduct Constituted Excusable Neglect.

[4] Despite incorporating by reference "all motions, memorandums [*sic*], records, exhibits and documents of Defendants related to the entry of default and the default judgment (and related issues) and all hearing transcripts and court orders contained in the court record of this action," Appellants fail to identify which—if any—of these myriad materials contains any argument that their failure to answer constituted "excusable neglect."

Further, to preserve an argument for appeal, the trial court must rule on that argument in the first instance. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) (an issue "must have been raised to and ruled upon by the trial judge to be preserved for appellate review"). On reconsideration, the trial court did not address excusable neglect as a grounds for relief from default.[5] Thereafter, Appellants failed to move under Rule 59(e) and request a ruling on that question.

Accordingly, Appellants failed to preserve any argument that the "excusable neglect" standard should apply to the question of setting aside the default. This Court should review the Master's ruling with regard only to the "good cause" standard.

2. Appellants Can Demonstrate Neither Good Cause Nor Excusable Neglect

The Master's decision is reviewed for abuse of discretion. *Wham v. Shearson Lehman Bros., Inc*., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) ("The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court.") In the present case, the Master correctly concluded that the Defendants failed to demonstrate that the default should be lifted. This ruling was amply supported by the evidence, was not controlled by an error of law, and therefore was not an abuse of discretion. *Belle Hall Plantation Homeowner's Association, Inc. v. Murray*, 419 S.C. 605, 615, 799 S.E.2d 310, 315 (Ct. App. 2017).

Appellants were personally served with PCG's summons and complaint on March 14, 2016. (**R. pp. 100-105- Affidavits of Service**). The summons stated:

> YOU ARE HEREBY SUMMONED *and required to answer the Complaint herein*, a copy of which is served upon you, and to serve

[5] Given the volume and convoluted nature of the filings in this matter, even had the issue been properly raised before the trial court, it would be entirely understandable that a court would overlook this un-fleshed-out argument in a 21-page motion incorporating the entire record. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

> a copy of your written response to the said Complaint on the subscribers at the law office of Andrew K. Epting, Jr., LLC, 46A State Street, Charleston, South Carolina, 29401, *within thirty (30) days of service hereof*, exclusive of the day of service; *and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.*

(**R. p. 45**) (emphasis added). No answer having been timely filed, PCG moved for default on April 18, 2016, and an default order was entered on April 21, 2016. Prior to the damages hearing scheduled for June 6, 2016,[6] Restoration submitted an affidavit by Mr. Ward purportedly providing a justification for Appellants' failure to answer. Therein, he stated:

> 4. I received the Summons and Complaint in the above referenced action on or about March 14, 2016.
>
> 5. Prior to receipt of the Summons and Complaint, I was contacted by James E. Rudnik, Esq., the Director – Risk Mitigation|Surety for The Hanover Insurance Group regarding the bond.
>
> 6. On or about March 10, 2016, Mr. Rudnik notified me of certain bond claims that had been made against the Bond.
>
> 7. Pursuant to my discussions with Mr. Rudnik, Restoration Specialists has made direct payment to several subcontractors deemed to have valid bond claims.
>
> 8. Further, Restoration Specialists continues to have discussions with Hanover regarding other bond claims made.
>
> 9. When I received the Summons and Complaint for the instant action, I thought that it was related to my arrangements with Hanover.
>
> 10. I am not an attorney and did not understand that the above captioned action was separate and apart from the bond claims that I have been working directly with Mr. Rudnik and Hanover to address.

(**R. pp. 108-09**). The affidavit failed to explain how a summons and complaint from PCG—

[6] The damages hearing was deferred on account of Appellants' motion for a continuance.

Restoration Specialists' teaming partner and co-guarantor on the surety bond—could be regarded as something "related to my arrangements with Hanover" that did not require a response. The affidavit failed to explain why the explicit direction in the Summons to answer within 30 days was not followed. It failed to explain why the Summons' explicit statement that "if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint" was insufficient to put Appellants that PCG *would* apply to the Court for the relief demanded if they did not answer the complaint. The affidavit failed to explain why the Summons and Complaint were *not* sufficient to inform Appellants that "this was a separate action," whereas a notice of a default damages hearing apparently *was* sufficient. *See* **Aff.** at ¶ 12. (**R. p. 109)**

The Master considered the affidavit and stated:

> Your Motion for Relief from the Entry of Default — I'm not going to rule on yet. *There's not much I saw in that affidavit that would give me indication that I would grant that motion. I can tell you that right now.* Okay?

(**R. p. 577**). On the basis of the lackluster effort to justify Restoration's failure to answer, the Master was well within in his discretion to deny Appellants' request to set aside the default. Accordingly, this ruling should not be disturbed on appeal.

3. Appellants Do Not Have a Meritorious Defense.

In cursory fashion, Appellants argue they have meritorious defenses justifying the lifting of the default (**Brief** at 17). This argument fails, because (i) Appellants merely list them in a cursory fashion (or simply by incorporating prior memoranda and filings) without argument or explanation and therefore fails to raise the issues for this Court's review;[7] (ii) the purported

[7] *See Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001).

meritorious defenses were not supported by any evidence sufficient to make a *prima facie* showing to the trial court when seeking to set aside the default, and (iii) the purported defenses are not meritorious defenses *to liability* as would justify setting aside the default. *See Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145–46, 719 S.E.2d 703, 706–07 (Ct. App. 2011) ("Under the *Wham* factors, we likewise find no abuse of discretion in Judge Barber's finding that Blue Ribbon did not show good cause sufficient to relieve it from the entry of default. [. . .] Regarding a meritorious defense, the second factor, Judge Barber accepted Blue Ribbon's acknowledgment that it had no meritorious defense to liability."); *McClurg v. Deaton*, 380 S.C. 563, 575–76, 671 S.E.2d 87, 94 (Ct. App. 2008) (noting the appellant "failed to make any showing of a meritorious defense" as "[t]here is no evidence of record, by affidavit or otherwise, to suggest that the accident was the result of anything other than [appellant's] negligence").

Nevertheless, PCG responds below to all defenses that Appellants expressly mention in their brief; however, 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 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."[8]

a. The Arbitration Provision

Appellants claim the arbitration provision constitutes a meritorious defense. However, the U.S. Supreme Court has held that an arbitration provision is not a substantive or contractual defense to an action's merits. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985) (agreeing to arbitrate a claim does not forgo or convey

[8] Further, Appellants moved to exceed the page limit for their initial brief, and this Court denied the motion. Appellants seek to circumvent the Court's order by incorporating reems of arguments made in prior filings.

substantive rights but merely submits their resolution to an arbitral, not judicial, forum).

b. Appellants' Assertion that PCG was Overpaid

Appellants claim as a defense that PCG was overpaid on its subcontract. This may have been a defense to damages, but it is not a defense to liability regarding whether Appellants breached their agreements. Nor is it meritorious. The testimony and records presented to the Master at the damages hearing demonstrated that PCG was owed $184,858.69 under the subcontract, and the Master so held.[9] This ruling was amply supported by the evidence, is not subject to reversal, and is not a meritorious defense to liability.

c. Profit Sharing

Appellants next claim as a meritorious defense that there is no profit-sharing provision in the Teaming Agreement. Again, this is not a defense to liability for Appellants' theft of the money paid by the VA, but is simply a defense to a specific category of damages. Nor is it meritorious.

The Teaming Agreement states, "[n]othing 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*." (**R. p. 1029**) (emphasis added). This is exactly what happened with the VA Project, and the subcontract between the parties and the parties' conduct reflects the parties' agreement to share the profits. The PCG Subcontract Breakdown" incorporated into the subcontract and attached thereto[10] expressly

[9] The Master found that that Appellants' conduct in paying PCG amounts above the original contract price following the increase in the scope of work demonstrated the parties' intent that PCG would be paid the total costs of the work. (**R. p. 25**); *see also* **R. p. 688**).

[10] Appellants argue that the PCG Subcontract Breakdown is not a part of the subcontract, because the subcontract at one point refers to a "PCG Subcontract Breakdown dated 9/5/14," and the "PCG Subcontract Breakdown" attached to the contract contains no date. However, the subcontract separately and expressly incorporates the "PCG Subcontract Breakdown" by page 15 of the subcontract at § 16.1.4.2 ("Other documents: 1. PCG Subcontract Breakdown").

refers to the "RS [Restoration Specialists] / PCG [Palmetto Construction Group] Projected 50% Profit Share." (**R. p. 1035, 1050**). Further, Mrs. Peterson testified at the default damages hearing that Restoration originally honored this agreement, providing contemporaneous business records substantiating that testimony. (**R. p. 642, 939**).

Appellants' assertion that there is no profit-sharing agreement between PCG and Restoration Specialists is demonstrably untrue. It is not a meritorious defense.

d. Waiver of Consequential Losses

Appellants claim the teaming agreement between the parties contained a waiver of indirect, special, or consequential losses. Once again, this would be a defense to damages, not a defense to liability for stealing money from the Government to the detriment of PCG. Nor did Appellants raise this argument at the damages hearing, indicating that Appellants apparently felt this was not a meritorious defense to damages either. And it is not meritorious. It was the parties' subcontract that provided for payment for PCG's work under the subcontract and a split of the profits, both of which Appellants breached; and Appellants have made no showing that the subcontract contained any waiver of consequential damages, as it does not.

d. Legal or Equitable Indemnity

Finally, Appellants contend that PCG waived or is barred from claiming indemnity pursuant to the indemnity agreement signed with Hanover. First, with regard to whether this constitutes a meritorious defenses, this argument is not preserved, as it was not raised to the trial court when Appellants sought to set aside the default. *See* **R. p. 137-38**. However, it would fail even if preserved This argument would, at most, be a defense to the award of a particular category of damages. It is not a defense to the substantive allegations that PCG was harmed by Appellants' stealing of the funds paid by the Government for the VA project.

e. Summary

Each of the arguments Appellants raise to demonstrate a "meritorious defense" fail. None is a defense to substantive liability, but at most constitutes an argument regarding damages. *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145–46, 719 S.E.2d 703, 706–07 (Ct. App. 2011). The Master did not abuse his discretion in refusing to set aside the default on the basis of a "meritorious defense."

4. Reconsideration of Order of Default

After the denial of their motion to set aside the default on July 20, 2016, Appellants moved for reconsideration on July 27, 2016 pursuant to Rule 59(e) only, and not under Rule 60. This is significant, as this State's Supreme Court noted in its decision in this matter that Rule 60(b) may permit Restoration to argue excusable neglect as a grounds for obtaining relief from the default order, rather than the higher standard of "good cause shown." *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639–40, 856 S.E.2d 150, 153 (2021) . However, Appellants having not argued excusable neglect before the trial court with regard to the denial of their request to be relieved from default, the issue is not preserved for appeal.

Nor is there any basis to find the Master abused his discretion in denying this motion to reconsider for the same reasons noted *supra*, Parts I.A.1–3 .

B. <u>The Master Properly Entered Default Judgment Against All Defendants.</u>

Appellants argue that PCG's complaint, even with all allegations admitted, was insufficient to establish liability on PCG's claims, rendering the default judgment improper, citing scant case law from South Carolina and relying instead on a case from Georgia and an unreported case from federal court in Alabama. **Brief** at 40–41**.** This argument, too, fails.

Again, Appellants fail to note *how* PCG's complaint is deficient. It merely posits that the Court must answer with a "resounding no" three enumerated queries: whether the elements of the

causes of action have been pled, whether factual allegations were asserted sufficient to sustain the causes of action, and whether there is a legitimate basis for the default damage award ordered. **Brief** at 41 (citing no South Carolina authority). Appellants have not stated to this Court why the answer to any of these questions is "no," and this issue has not been properly raised for this Court's consideration.

Assuming this argument is properly raised/preserved, PCG is confident that this Court's review of PCG's complaint will show Appellants' position to be without merit.[11] When construing a complaint, "the pleading must be liberally construed in favor of the pleader," the pleader getting the benefit of all reasonable inferences. *Pilkington v. McBain*, 274 S.C. 312, 313–14, 262 S.E.2d 916, 917 (1980). Pleadings should be read as a whole, "and with the purpose of ensuring substantial justice to all parties." *Parrish v. Allison*, 376 S.C. 308, 328, 656 S.E.2d 382, 392 (Ct. App. 2007). PCG's complaint alleges various acts of wrongdoing by Appellants and asserts liability as to each Defendant, alleging breach of agreements, fraud, negligent misrepresentation, and an obligation to indemnify PCG against claims by the surety. Each of these claims, admitted by default, is adequately pled and provides a basis for Appellants' liability to PCG for the various categories of compensatory damages awarded by the Master.

C. The Amount of Damages Awarded Was Proper.

A Master's factual findings are to be affirmed "if there is any evidence in the record which reasonably supports them." *Estate of Tenney v. S.C. Dep't of Health & Envtl. Control*, 393 S.C. 100, 105, 712 S.E.2d 395, 397 (2011). Here, the Master's finding as to the amount of damages as to each category of damages was amply supported by the evidence.

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[11] This Court may affirm on any basis appearing in the record. Rule 220(c), S.C.A.C.R.; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)

1. Owing to PCG for its Work Under the Subcontract

The Master awarded PCG $184,858.69 for their work under the subcontract, based on testimony that that amount was owing as of September 15, 2015 (**R. p. 657**), and contemporaneous business records showing PCG's compensable costs were $1,281,427.88 and it was paid only $1,096,858.69. (**R. p. 939**). Mrs. Peterson testified that the parties' agreement was that PCG would be paid for all of its costs and would not be limited by the original sum stated in the subcontract. (**R. p. 689-90**). The award is supported by ample evidence, contains no legal error, and is not subject to reversal.

2. PCG's Share of Profits

The Master awarded PCG $225,389.81, based on testimony that the parties agreed to share profits, that Restoration originally *did* may profit-share payments to PCG, and business records reflecting that agreement and those payments. (**R. p. 692-93, 93-98, 1035, 939).** Included in this documentary evidence was a worksheet reflecting the amounts of the various pay applications submitted by Restoration to the VA, a breakdown of the costs known to PCG, and a calculation of the resulting profit. (**R. p. 939**). The worksheet reflects a $20,063.18 profit from the first pay application, and shows $10,031.59 (or ½) was paid to PCG; it shows a profit of $11,747.18 on the second pay application, and that $5,873.59 was paid to PCG. (**R. p. 939)**. The award is supported by evidence, is not based upon an error of law, and is not subject to reversal.

3. Indemnity of PCG's Liability to Surety

The Master awarded PCG $1,307,978.71, based on the language of the indemnity agreement between the parties and Hanover, which stated "[p]ayment shall be made to the Surety by Indemnitors *as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefor.*" (**R. p. 1053** (emphasis added)). As liability had been asserted against Hanover, and as Hanover formally demanded payment of those amounts

from PCG (**R. p. 1608, 1073)**, the Court properly found they constitute a damage PCG owes to Hanover for which Appellants are liable. The award is supported by evidence, is not based upon an error of law, and is not subject to reversal.

4. PCG's Lost Profits

The Master did not award PCG the $250,000 requested in lost profits as a result of being forced out of business by Appellants' action, finding the damages too speculative. (**R. pp. 27-8**).

5. PCG's Attorney's Fees

The Master also did not award PCG the $29,5645.91 in attorneys' fees they incurred in other matters—mostly collection matters—brought after PCG failed as a result of Appellants' actions, finding them to be speculative. (**R. p. 28**).

6. Prejudgment Interest

"The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." *Butler Contracting, Inc. v. Ct. St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). "The fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.* at 133, 631 S.E.2d at 259.[12]

[12] Appellants contend that prejudgment interest was not pled in PCG's complaint and therefore cannot be awarded. This issue was not raised before the trial court, despite the issue of prejudgment interest being addressed at length at the damages hearing (**R. p. 704-05, 723-24**). It was raised for the first time in Appellants' Motion to Reconsider (**R. p. 472**), and is not preserved. *See, e.g.*, *Johnson v. Sonoco Prods.Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("Sonoco contends such an award rests exclusively in the Workers' Compensation Commission. We find this issue is not preserved. The issue first appears in Sonoco's motion

PCG sought prejudgment interest on only two categories of its damages — the amount owed to PCG for its work under the subcontract, and the indemnity of PCG's liability to the surety. As to the former, the Master found that those damages were a sum certain as of October 15, 2015 based upon PCG's business records tracking project costs and payments received (**R. p. 939**) and testimony regarding the same (**R. p. 658)**. He awarded PCG prejudgment interest on that amount from October 4, 2016 (the date the June 6, 2016 damages hearing was rescheduled for)[13] in the amount of $83,674.28**.**[14]

As to PCG's liability to the surety, the Master considered the original September 30, 2016 letter from the surety to PCG stating that Hanover had paid $1,186,501.71 to date. The Master found this amount paid by Hanover was a sum certain prior to October 4, 2016. The Master awarded prejudgment interest in the amount of $537,057.15 on this amount.

This determination that PCG was entitled to prejudgment interest was amply supported by the evidence, was not based upon an error of law, and is not subject to reversal.

II. RESTORATION'S MOTION TO DISMISS WAS PROPERLY DENIED.

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seeking reconsideration of the circuit court's December 20, 2006 order. An issue may not be raised for the first time in a motion to reconsider.").

Furthermore, had it been raised by the trial court, PCG would have been able to move to amend the complaint to conform with the evidence and specifically request prejudgment interest pursuant to Rule 15(b), having specifically requested it in the damages hearing. *See Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 368, 656 S.E.2d 765, 768 (Ct. App. 2007) ("And amendment to a complaint is sufficient to place the demand for pre-judgment interest before the trial judge."); *McMillan v. S.C. Dep't of Agriculture*, 364 S.C. 60, 75, 611 S.E.2d 323, 331 (Ct. App. 2005) (finding a generalized amendment to conform to the evidence that does not specifically request prejudgment interest is insufficient to entitle the plaintiff to prejudgment interest), *rev'd on other grounds*, 380 S.C. 212, 670 S.E.2d 368 (2008).

[13] The Master noted the fairness of this, as Appellants had delayed the damages hearing by over five years by filing multiple appeals that were dismissed by this Court.

[14] The Master used the prevailing rate of legal interest at the time of the award, 7.25%, rather than the higher statutory rate of 8.75%. S.C. Code § 34-31-20(a).

A. Procedural Grounds

Restoration, though in default, moved to dismiss this lawsuit, contending that PCG had terminated its legal existence, could not maintain a lawsuit, and therefore there remained no case or controversy, requiring dismissal. However, the trial court properly noted that a party in default cannot move to dismiss. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 635–36, 856 S.E.2d 150, 151 (2021), *reh'g denied* (Apr. 20, 2021) ("A party in default has three primary options: (1) do nothing pending the entry of judgment by default under Rule 55(b), SCRCP; (2) file an appearance under Rule 55(b)(2), SCRCP, in an attempt to protect its interests before the entry of judgment by default; or (3) request the entry of default be set aside pursuant to Rule 55(c), SCRCP.") .

Secondly, the motion was a nullity, having been filed in the trial court at a time that jurisdiction was vested in this Court. Indeed, remittitur to the trial court did not occur until five days *after* the filing of Appellants' Motion to Dismiss. (**R. p. 543**). This too provides a procedural basis for the denial of the motion.[15]

B. Substantive Grounds

1. PCG Did Not Terminate its Existence.

The denial of the motion was proper as a substantive matter, too. On March 22, 2019, one Joanne Eaddy filed articles of termination, purportedly on behalf of PCG. (**R. p. 1027**). In the articles, she purported to be a fiduciary of PCG and its finance director. She was neither. Ms. Eaddy is the finance director for *Thompson Construction*, an entirely separate entity having no

[15] This ground was not argued before the trial court by PCG, however this Court may sustain the trial court's ruling on any grounds apparent from the record before it. Rule 220(c), S.C.A.C.R.; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (prevailing party in the trial court may raise on appeal any additional reasons should affirm regardless of whether presented to or ruled upon by the trial court).

relationship to PCG, and Ms. Eaddy lacked any authority to file articles of termination. (**R. p. 11**). Ms. Eaddy signed a sworn affidavit to that effect, stating that the termination had been in error and that she had intended to terminate a Delaware corporation operating under the same name. (**R. p. 114**).

Nor *could* PCG have been properly terminated at the time the articles were filed. Articles of Termination require an attestation that the entity is dissolved and has finished winding up its business. *See* S.C. Code § 33-44-805(a) ("At any time *after dissolution and winding up*, a limited liability company may terminate its existence by filing with the Secretary of State articles of termination. . . ." (emphasis added)). PCG never dissolved, and so it could not have been properly terminated, even if the filer was authorized to act on behalf of Palmetto. (**R. p. 1080**).

2. PCG Properly Corrected the Record and Is Not Estopped From Contesting the Motion

By statute, a filed record may be corrected "if the record contains a false or erroneous statement or was defectively signed." S.C. Code § 33-44-207(a). Here, both are true, as discussed *supra*. Therefore, PCG filed Articles of Correction to undo the improper termination and reinstate PCG as an entity in good standing. (**R. p. 1081)**. Upon receipt of the Articles and submission of the Handegan and Eaddy affidavits, the South Carolina Secretary of State reinstated PCG as an entity in good standing with the effective date of October 30, 2000 with the effective date of October 30, 2000.[16] (**R. p. 1080**).

However, a party who reasonably relies upon the accuracy of a filed record and is harmed by the correction may estop another party from contesting the accuracy thereof. S.C. Code § 33-

[16] However, after PCF was improperly terminated, another entity applied for and began using the name "Palmetto Construction Group LLC." Accordingly, in order to reinstate PCG, a new name had to be fashioned; though it remains the same entity, Palmetto is now legally known as "Palmetto Construction Group of SC, LLC."

44-207(c). This does not prevent PCG from contesting Appellants' motion, however, as Appellants were not entitled to rely upon the articles of termination given their facial defects, including the absence of articles of dissolution ever having been filed. Nor were Appellants adversely affected by the correction. The only prejudice that Appellants could suffer by PCG's continued existence and pursuit of its rights against Appellants is Appellants' continued exposure to liability. However, knew PCG continued to pursue its legal rights against Appellants, having just gone to the Supreme Court in furtherance of that effort, and simply sought another technical ground to delay a judgment being entered against it. The statute rightfully seeks to protect bona fide parties who rely on the public record; it does not seek to provide guilty parties means of evading liability.

These are unusual facts. But they were not of PCG's making, were remedied by PCG, and the Master did not err in denying the Motion to Dismiss, whether on procedural or substantive grounds.

C. Reconsideration

For these same reasons, the Master did not err in denying Appellants' motion for reconsideration of this ruling. In addition to the substantive grounds, the Master also denied the motion on procedural grounds, noting *inter alia* that no copy of the motions were sent to the Master as required by Rule 59(g), S.C.R.C.P.

III. THE MASTER'S DENIAL OF APPELLANTS' MOTION TO EXCLUDE AND STRIKE WAS NOT AN ABUSE OF DISCRETION.

Restoration contends that materials PCG provided to the Court, the witness, and opposing counsel during the default damages hearing and filed with the Court thereafter (**R. p. 737**) should be excluded on the basis that they were not formally admitted into evidence during the hearing.

This flies in the face of the purposes behind the rules of evidence, and the Master did not abuse his discretion in denying the motion. As Restoration has not argued that the Master *did* abuse his discretion in this regard, the Master should be affirmed.

A. Appellants Failed to Argue the Master Abused His Discretion

Appellants correctly note that a trial court's evidentiary rulings are reviewed for abuse of discretion only. **Brief** at 12–13; *Matter of Bilton*, 432 S.C. 157, 161, 851 S.E.2d 442, 444 (Ct. App. 2020) (evidentiary rulings subject to reversal only upon a showing of "manifest abuse of discretion accompanied by probable prejudice").

The Master denied Appellants' motion to exclude and strike evidence presented at the Default Damages Hearing, and Appellants appealed the denial. Not only did the Master *not* abuse his discretion as to this ruling, but Restoration fails to even argue that he did. *See* **Brief** at 34–39. Failure to present an argument in an opening brief waives that argument. *See ABB, Inc. v. Integrated Recycling Grp. of SC*, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021) ("a party cannot raise an issue for the first time in an appellate reply brief"). This ruling of the Master ought to be affirmed on this basis alone.

B. The Materials in Question *Are* in Evidence

Appellants contend the documentary evidence presented at the damages hearing was "never admitted into evidence by the Court." **Brief** at 37. In the same brief, Appellants concede the materials *were* admitted into evidence:

> "[V]arious 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 Appellant's evidentiary objections at the default damages hearing* . . . .

Brief at 17–18. This is a necessary concession. Aside from being presented to the Master and

opposing counsel during the damages hearing, and being reviewed with the witness, the materials were objected to on various grounds by Appellants' counsel. Appellants' objections were overruled by the Master, the materials were subsequently filed with the Court as hearing exhibits, and the Master denied Appellants' Motion to Exclude or Strike.[17] The argument that they are not in evidence or were not properly before the Master for his consideration is entirely untenable.

C. The Master Did Not Abuse His Discretion

The Rules of Evidence are to "be construed to secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined." Rule 102, S.C.R.E. The testimony by Mrs. Peterson and the materials offered in support of her testimony were found to be authentic, relevant, reliable, credible, and accurate; to strike them from the record would not serve the ends of truth and justice.

A review of the hearing transcript reveals that the documents were properly identified and authenticated by the witness. *See, e.g.*, **R. p. 641**. The Master did not abuse his discretion in considering the documentary evidence presented on and filed in the record as admitted evidence for the purpose of the default damages hearing. Trial courts are afforded wide discretion in admitting evidence. The Master's decision to treat the exhibits as admitted in a non-jury damages hearing does not approach the "manifest abuse of discretion" or the "probable prejudice" required for reversal. *Matter of Bilton*, 432 S.C. 157, 161, 851 S.E.2d 442, 444 (Ct. App. 2020).

D. Reconsideration

For these same reasons, the Master did not err in denying Appellants' motion for

[17] In opposing Restoration's Motion, PCG requested that, if the Master deemed it necessary, the hearing be reopened for the sole purpose of formally moving the hearing exhibits into evidence. The Master did not deem it necessary and simply denied Restoration's motion.

reconsideration of this ruling.

IV. RESTORATION COULD NOT COMPEL ARBITRATION BECAUSE IT WAS IN DEFAULT.

This Court previously found in this very case that a party in default cannot compel arbitration and has waived its right to arbitrate. *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 428 S.C. 261, 267, 834 S.E.2d 204, 207 (Ct. App. 2019). The Supreme Court affirmed with a modification, holding the issue of waiver was not ripe because Appellants' appeal was premature since no default judgment had been entered; it therefore noting that only if Restoration's challenge to the entry of default is successful "may [they] claim they did not in fact waive their contractual right to arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 640, 856 S.E.2d 150, 153 (2021) The basis for the Supreme Court's opinion is what this Court previously found — that a party in default cannot compel arbitration without first having the default lifted. Because the Master did not err in holding Restoration in default, this Court need not reach the questions of whether Restoration could compel arbitration and whether going into default waives a party's arbitration rights.

Nevertheless, PCG provides the following substantive discussion of the issue.

A. A Party in Default Cannot Seek Affirmative Relief

This Court has stated the following about parties in default:

> It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations[18] and to have conceded liability.

Roche v. Young Bros., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (citations omitted). Having conceded liability, a party in default has limited recourse before the courts:

[18] *See infra*, Part II.B.2.

> Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence.

Id. at 81–82, 504 S.E.2d at 314. Further, a party's "status as a defaulting party [is] not vitiated simply because it later chose to challenge the default judgment rendered against it." *Id.* at 82, 504 S.E.2d at 315.

Accordingly, this Court previously ruled:

> Appellants' default should not be excused because they chose to file a claim for arbitration to remove their default status. Therefore, the master correctly found Appellants' motion to stay and compel arbitration was not proper due to Appellants' default status.

Palmetto Constr. Grp. v. Restoration Specialists, LLC, 428 S.C. 261, 267, 834 S.E.2d 204, 207 (Ct. App. 2019). Thereafter, the Supreme Court noted, "[o]ur courts' statements that the law "favors" arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions. *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 636, 856 S.E.2d 150, 152 (2021).

When—after being personally served with the summons and complaint—Petitioners failed to answer, Petitioners were properly placed in default. Because they failed to show good cause for lifting the default,[19] Petitioners' remained in default at the time they sought to move to compel arbitration, and the motion is therefore a nullity.

B. A Party in Default Has Admitted the Allegations in the Complaint

A defaulting party is deemed to have admitted the truth of the allegations against it, thus conceding liability. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)

[19] PCG notes that Restoration's affidavit purportedly justifying their lack of a response to the pleading nowhere asserts arbitration as a basis for failing to file an answer or even mentions a right to arbitrate.

("By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability." (internal quotation omitted)). One of the allegations in the complaint was that jurisdiction was vested in the trial court and that venue was proper there. *Complaint* at ¶ 6 (ROA 13). Admission of that allegation constitutes an "emphatic repudiation" of the right to compel arbitration. *See Bland v. Green Acres Grp.*, 12 So.3d 822, 824 (Fla. App. 2009) ("Assuming proper service and actual knowledge of the case, it is difficult to imagine a more emphatic repudiation of the right to arbitrate than an admission that a court is a proper forum to determine the claim."). This Court properly held that Appellants waived their arbitration right.

C. Failure to Raise Arbitration as an Affirmative Defense Waives the Right

Courts in this State have long understood that the right to arbitration can be waived by failing to raise arbitration as a defense in a pleading. *See Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 466, 381 S.E.2d 499, 502 (Ct. App. 1989) (quoting 5 Am. Jur. 2d *Arbitration & Award* § 51 at 556–57 for the proposition that "one's right to arbitrate given by contract may be waived by failing to raise the right in an answer"); *see also Partain v. Upstate Auto Grp*., 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) ("Upstate Auto asserted three affirmative defenses in its Answer, including an arbitration agreement with Partain."); *Howard v. S.C. Dept. of Highways*, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) ("Affirmative defenses are waived if not pled."); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) ("a defendant's failure to raise arbitration as an affirmative defense shows his intent to litigate rather than arbitrate").

A party in default has waived its right to plead and therefore waived the right to raise the

affirmative defense of arbitration.[20] To regain the right, it must present good cause for the default to be lifted. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[21] It should not be permitted to circumvent this requirement by seeking to compel that which it waived.

D. Prejudice

Appellants argue that the record lacks a showing of prejudice that would justify a finding of waiver of the arbitration right. The Master heard evidence that PCG went out of business as a result of Restoration's wrongdoing. (**R. p. 647-48)**. Restoration did not pay the money it received from the project to its subcontractors, who filed claims with the surety. (**R. p. 1068, 645)**. PCG was answerable to the surety, and so was in desperate need of recovering the funds that Restoration had stolen in order to be able to obtain bonds in the future, which was essential for PCG's continued ability to obtain work. **R. p. 648.** Therefore, it needed a speedy resolution to its claims against Restoration to avoid bankruptcy. Appellants' delays—which continue through this day—cost PCG and its owners everything. The business is defunct, and the owners—who were personal guarantors of the surety bonds—were ruined. (**R. p. 1053)**. There can be no question but that PCG was severely prejudiced by Appellants' delays.

Further, even before the damages hearing occurred, it was proper for the courts to be advised of and consider the prejudice suffered by PCG. A party cannot point to a lack of evidence when its own conduct is the reason for the absence of that evidence. *See Champion v. Whaley*,

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[20] *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978).

[21] As noted *supra*, a party in default can do little beyond move to be relieved from default and, should that motion be denied, move for reconsideration. If reconsideration is denied, it can participate in a damages hearing; but even then, it is only allowed to cross examine the plaintiff's witnesses. *See Limehouse v. Hulsey*, 404 S.C. 93, 113–16, 744 S.E.2d 566, 577–79 (2013).

280 S.C. 116, 121–22, 311 S.E.2d 404, 407 (Ct. App. 1984) ("The defendant cannot take advantage of the uncertainty caused by his own wrongdoing."). Such was the case here.

Immediately before the default damages hearing was to take place—a hearing at which Palmetto was to give testimony of what the damages it had and would continue to suffer—Appellants served their first notice of appeal. This deprived the trial court of jurisdiction to conduct the hearing, and it prevented evidence being offered of the nature of the harm suffered by Palmetto and the prejudice that it would—and ultimately did—suffer as a result of Appellants' delay. Appellants cannot rely on an absence of that evidence to argue the absence of waiver.

CONCLUSION

For the reasons stated herein, and/or for any reason that this Court discerns from the record, PCG requests this Court affirm the Master's orders in their entirety.

Respectfully Submitted:

This 13th day of June, 2023
Charleston, South Carolina

/s/ Jaan Rannik

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

2016-CP-10-1143
Appellate Case No.: 2016-002308

Palmetto Construction Group, LLC,.....*Respondent*,

v.

Restoration Specialists, LLC, Reuben Mark Ward, and
Lynnette Pennington Ward, ...*Appellants*.

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(B)

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b).

Respectfully Submitted By:

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