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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

C. Stephen Bennett, Special Referee

Appellate Case No. 2024-000006

Bullard & Son, Inc., d/b/a Lowcountry Medical Linens,……....……..……Respondent,

v.

Ridgeland Nursing Center, Inc., Ridgeland NC, LLC, and SC OPCO, LLC, Defendants,

Of which SC OPCO, LLC is the.……Appellant.

FINAL BRIEF OF RESPONDENT

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II. Whether SC OPCO is legally prohibited from challenging the amount of damages awarded because it waived a challenge by choosing not to attend the damages hearing and is bound to the contract's damages provisions by virtue of its default?

III. Whether the early termination fee provision is legally proper?

IV. Whether the Special Referee properly exercised his discretion in awarding attorney's fees when he considered all of the *Glasscock* factors?

STATEMENT OF THE CASE

This is an appeal from a default judgment in a breach of contract and quantum meruit action in which Appellant SC OPCO, LLC, received weekly medical linen services from Respondent Bullard & Son, Inc., d/b/a Lowcountry Medical Linens ("Lowcountry") and then refused to pay 50 invoices. When Lowcountry filed and served a lawsuit, SC OCPO chose to ignore it and went into default.

On January 5, 2023, Lowcountry filed a Complaint against SC OPCO asserting causes of action for breach of contract and quantum meruit. (R. pp. 44-48). On February 14, 2023, when 30 days passed after proper service without receipt of an answer, Lowcountry filed an affidavit of default as to SC OPCO. (R. pp. 52-55). On February 18, 2023, the lower court entered an Order of Reference to Special Referee. (R. pp. 1-3). On March 1, 2023, the lower court filed an Entry and Order of Default as to SC OPCO. (R. pp. 4-6).

On March 30, 2023, Lowcountry sent SC OPCO notice of a damages hearing. (R. pp. 97-98). On May, 12, 2023, after a hearing, the Special Referee entered judgment against SC OPCO and Defendant Ridgeland NC, LLC. (R. pp. 11-18). On May 25, 2023, SC OPCO filed a motion to set aside default and for a new trial. (R. pp. 60-72). Lowcountry filed a memorandum in

opposition to the motion. (R. pp. 87-96). After a hearing, the Special Referee entered an Order denying SC OPCO's motion on September 13, 2023. (R. pp. 19-31).

On September 25, 2023, SC OPCO filed a motion to reconsider. (R. pp. 112-132). Lowcountry filed a memorandum in opposition. (R. pp. 133-150).

On December 7, 2023, the Special Referee filed an order denying the motion. (R. pp. 32-42). On January 2, 2023, SC OPCO filed a notice of appeal. (R. pp. 201-202).

FACTS

Lowcountry Medical Linens is a family business based in Brunson, South Carolina, that has provided medical linens services since 1946. (R. p. 49). Ridgeland Nursing Center is a skilled nursing facility in Jasper County, South Carolina, that SC OPCO bought.

In March 2020, Ridgeland Nursing Center contracted with Lowcountry to receive medical linen services. (R. p. 49). The services included sheets, pillow cases, bed pads, floor mats, bath towels and washcloths, kitchen towels, mops and mop pads, aprons, and tablecloths. *Id.* All of these are essential to providing routine, daily care for patients' cleanliness, food, and sleep. The Contract started on April 1, 2020, and had a 60-month (5-year) term with an automatic two-year renewal absent 60-days' notice of nonrenewal. *Id.* The original 5-year term expired on March 31, 2025. If Ridgeland Nursing Center terminated the Contract early, it agreed to pay "a depreciated rate of 50% of the rental rate times the number of weeks left in the agreement." *Id.*

For any late payment of an invoice past 30 days, the Contract provided a 1.5% late charge (18% per annum). *Id.* The Contract included an attorney's fees provision, stating the "Customer will be responsible for all legal fees to collect any unpaid balances." *Id.* It also expressly applied to any successor, stating "This agreement is in effect and shall enure to the benefit of any

successors or assignees." *Id.* Sheri Boyles executed the Contract on behalf of Ridgeland Nursing Center. *Id.*

From April 2020 through mid-February 2022, Lowcountry provided linen services and received payments for its weekly invoices. (R. pp. 45-47). This included payments for the weeks of November-December 2021 and January-February 2022, during which SC OPCO owned and operated the facility. *Id.* Beginning with the invoice for February 28, 2022, Lowcountry stopped receiving payments. *Id.*

Appellant SC OPCO is a New Jersey company that bought Ridgeland Nursing Center on November 1, 2021. (R. p. 83). It continued to employ Sheri Boyles as the facility administrator. (R. p. 99). It also employed Joe Neuman of New Jersey to "oversee the business activities of SC OPCO and [have] . . . primary responsibility for the business operations of [the facility] . . . including negotiating contracts with vendors, as well as approving invoices for services, and authorizing payments." (R. pp. 83-84). For almost four months (or sixteen invoices), after SC OPCO bought the facility, it paid Lowcountry's invoices. (R. pp. 45-47). SC OPCO never informed Lowcountry that it bought the facility. SC OPCO was able to continue operations of the facility without interruption because it received linen services from Lowcountry.

From February 28, 2022, through June 22, 2022, Lowcountry sent 50 invoices that totaled $20,311.36 for linens delivered while SC OPCO owned and operated the facility. (R. pp. 46-47). SC OPCO refused to pay them, all the while continuing to operate a facility by receiving the weekly linen deliveries. SC OPCO also kept linens that it should have returned to Lowcountry, with a value of $1,243.83. (R. p. 47).

On January 5, 2023, Lowcountry filed a Summons and Complaint against SC OPCO, Ridgeland Nursing Center, and Ridgeland NC. (R. pp. 43-48). The Summons states "**TO THE**

DEFENDANT ABOVE-NAMED" you are "required to answer the complaint . . . and to serve a copy of your answer to this complaint upon" the plaintiff's counsel "within thirty (30) days of service." (R. p. 43) (underline emphasis added). It specifically stated what would happen if a defendant failed to answer. "[I]f you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint." *Id.* (emphasis added).

Lowcountry alleged that SC OPCO owned property and transacted business in Jasper County "through the Ridgeland Nursing Center." (R. p. 44). Lowcountry alleged causes of action for breach of contract and quantum meruit "against all Defendants." (R. pp. 45-48) (emphasis added).

Lowcountry alleged that the "Contract inured to the benefit of [] any successor or assigns" and that "Defendants have refused to pay the invoices thereby breaching the terms of the Contract." (R. pp. 45-47) (emphasis added). Lowcountry pled damages of $20,311.36 in unpaid invoices, $1,243.83 in unreturned inventory, $2,266.59 in late charges through December 31, 2022 that continues to accrue interest at 18% per annum, attorney's fees for having to bring the action, and $90,353.85 for early termination of the Contract. (R. pp. 47-48).

Lowcountry properly served SC OPCO on January 6, 2023, by personal service on its registered agent in Columbia. (R. p. 50). When SC OPCO failed to answer within 30 days, Lowcountry filed an affidavit of default. (R. pp. 52-53). The lower court filed an Entry and Order of Default finding that SC OPCO "is in default" and "the allegations of the Complaint are deemed admitted," and referred the case to a Special Referee to determine damages. (R. pp. 1-6).

On April 24, 2023, Special Referee C. Stephen Bennett held a damages hearing. (R. p. 11). Lowcountry sent SC OPCO notice of the damages hearing by first class mail pursuant to Rule 55(b), SCRCP, but SC OPCO did not appear at the hearing. (R. pp. 97-98, 11, 14). The Special

Referee heard testimony from Perry Bullard, owner of Lowcountry, and reviewed exhibits of the notice of hearing, late charge calculation, a summary of the early termination fee calculation, and the case costs. (R. pp. 14-16). On May 12, 2023, the Special Referee entered judgment against SC OPCO and Ridgeland NC for $154,178.33, which consisted of the following:

1. $20,311.36 in unpaid invoices
2. $1,243.83 in lost inventory
3. $3,349.30 in late charges as of March 31, 2023
4. $90,353.85 early termination fee
5. $500.54 in case costs
6. $38,419.45 in attorney's fees

(R. pp. 15-16).

On May 25, 2023, SC OPCO filed a motion to set aside default and for a new trial. (R. pp. 60-72). SC OPCO argued that it made a "mistake of fact." (R. pp. 66-67). The alleged mistake is that, although it received personal service of the Summons and Complaint after receiving invoices from Lowcountry for months, it did not need to respond to the Complaint because it was not a party to the Contract. (R. pp. 66-67). It provided no explanation for why it believed it did not need to respond to the quantum meruit claim but, instead, merely said it was still "investigating" that claim over four months after it received service of the Complaint. (R. p. 69). It did not consult a lawyer to determine whether it needed to respond to legal service but, instead, simply chose not to respond.

SC OPCO filed an affidavit of Joe Neuman, its employee who has "primary responsibility for the business operations of" the facility "including negotiating contracts with vendors, as well as approving invoices for services, and authorizing payments." (R. pp. 83-84). Neuman stated that SC OPCO bought the assets, not the liabilities, of the facility and that he did not know about the Contract. (R. p. 84). He stated that SC OPCO "did not realize the lawsuit also claimed SC OPCO

LLC was liable to" Lowcountry because "SC OPCO had no knowledge of" Lowcountry and did not contract with it. (R. p. 84).

Sheri Boyles, who signed the Contract for the facility, was still employed by SC OPCO during its ownership and use of Lowcountry's linen services.[1] (R. pp. 99, 171). Neuman did not address her knowledge. He did not explain why SC OPCO ignored that it is named as a defendant and received legal service of process requiring it to respond. He did not explain why SC OPCO did not answer the Complaint and assert that it was not a party Contract. He did not explain how SC OPCO could purchase a state and federally-regulated health care facility without knowing its current vendor contracts. He did not explain how SC OPCO could receive weekly deliveries of linens and invoices from Lowcountry for over sixteen weeks and not have "knowledge of" Lowcountry or know that it owed a debt. He did not claim that SC OPCO was surprised by the lawsuit.

Lowcountry filed a memorandum in opposition to the motion. (R. pp. 87-96). It argued the law that failure to understand the legal process is not excusable neglect under Rule 60(b), SCRCP. (R. p. 90). It argued that SC OPCO is bound to the Contract and does not have a meritorious defense because it received the linen services when it did or should have known of the Contract and is responsible for payment of services based on its conduct. (R. pp. 93-94). It argued the attorney's fee is reasonable, and Lowcountry will suffer prejudice if the judgment is vacated because there are multiple debtors of SC OPCO and Lowcountry needs to maintain its collection priority based on the judgment date. (R. pp. 94-96).

[1] A federal Medicare.gov record as of July 5, 2023 showed Sheri Boyles as the facility administrator. At a hearing on July 20, 2023, SC OPCO's counsel stated SC OPCO terminated Boyles in May 2022.

The judgment-priority argument was based on another collection lawsuit filed against SC OPCO on December 22, 2022, just weeks before Lowcountry filed this lawsuit. (R. pp. 101-103). That lawsuit was also based on a vendor contract entered into before SC OPCO purchased the facility but as to which SC OPCO continued receiving services after the purchase and then refused to pay invoices. *Id.* SC OPCO also failed to answer that lawsuit and, on February 10, 2023, the lower court entered a default judgment against SC OPCO for $142,420.47.[2] (R. pp. 104-108). That lawsuit and this lawsuit were served on the same registered agent for SC OPCO. That lawsuit was served on December 29, 2022, meaning that SC OPCO received service of process for two lawsuits within a month and chose not to respond to either one.

On July 20, 2023, the Special Referee held a hearing on SC OPCO's motion. It argued mistake of fact as the basis for setting aside the judgment and said the mistake is that Lowcountry "must be pursuing the predecessor" and not SC OPCO. (R. pp. 170-173, 177-178). SC OPCO never explained how the "predecessor" could be liable for debts incurred while SC OPCO owned and operated the facility.

On September 13, 2023, the Special Referee entered an Order denying SC OPCO's motion. (R. pp. 19-31). The Special Referee held that Rule 60(b), SCRCP, and not Rule 55(c), SCRCP, applies because, a default judgment for damages was already entered when SC OPCO filed its motion.[3] (R. p. 21). Under Rule 60(b), he held that SC OPCO failed to prove a mistake. (R. pp. 22-23). He found SC OPCO is a sophisticated entity that received service of process requiring it

[2] According to the public records on sccourts.org, that case was not appealed and is in supplemental proceedings for collection.

[3] The Special Referee also held that, even if Rule 55(c) applied, he would still deny the motion. (R. pp. 29-30).

to answer a complaint about a debt that it already knew existed. (R. pp. 22-25). The Special Referee explained:

> I cannot get beyond the fact that SC OPCO made a conscious decision to repeatedly ignore a validly served Summons and Complaint and, to compound their self-made dilemma, it failed to contact me or appear at the April 25, 2023 damages hearing after receiving proper notice of the hearing. That is not a mistake at all—it is intention.

(R. p. 25). Further, any alleged mistake, if it existed, was a mistake of law and not of fact such that it could not legally support setting aside the judgment. (R. pp. 23-24). While the absence of a mistake was enough to deny the motion, the Special Referee held that, even if a mistake existed, SC OPCO failed to meet the other factors of promptness, meritorious relief, and prejudice. (R. pp. 25-29).

As to promptness, the Special Referee found that SC OPCO ignored 50 invoices and then ignored valid service of process—showing it knew about the lawsuit and delayed in responding until after a default judgment. (R. pp. 25-26). As to a meritorious defense, the Special Referee held that there is no defense to payment of the invoices because it received those services and must pay for them. (R. p. 26). There is also no meritorious defense to the late fees, early termination, and attorney's fees because it knew or should have known the weekly linen services were provided under a contract that its administrator signed and it continued to receive the services for six months after taking over ownership. (R. p. 26). Further, that SC OPCO purchased assets and not liabilities was not relevant because the lawsuit is about SC OPCO's own liability incurred after it bought the facility. *Id.* As to the amount of attorney's fees, the Special Referee found no meritorious defense because contingency fee agreements are allowed on breach of contract cases and, the fees are reasonable under an evaluation of the *Glasscock* factors. (R. pp. 27-28).

As to prejudice, the Special Referee found vacating the judgment would prejudice Lowcountry because it "did everything it was required to do in this case" while SC OPCO ignored

invoices, the Summons and Complaint, and notice of a damages hearing. (R. p. 28). Lowcountry's rights to a properly-obtained default judgment "outweigh the right of SC OPCO, who ignored the legal process, to have its day in court." (R. p.29).

The Special Referee denied the motion for a new trial as to damages and denied the motion to extend the time to answer. (R. p. 30).

On September 25, 2023, SC OPCO filed a motion to reconsider. (R. pp. 112-132). It asked for a new trial as to damages, arguing it is liable only for the amount of unpaid invoices. (R. pp. 115-124). Despite the admission for liability for the unpaid invoices, SC OPCO has still not paid those uncontested damages (plus statutory interest) to Lowcountry. (R. p. 117 n. 7). SC OPCO also asked the court to reconsider its denial of the Rule 60(b) motion and argued the attorney's fee award is unreasonable. (R. pp. 124-131).

Lowcountry filed a memorandum in opposition. (R. pp. 133-150). SC OPCO did not file a reply or ask for a hearing.

On December 7, 2023, the Special Referee entered an order denying the motion to reconsider in which he incorporated the prior order and made numerous, independent rulings on each issue raised by SC OPCO. (R. pp. 32-42). The reasons are listed below for brevity and, while the list appears long, the central rationale is simple—SC OPCO received service and chose not to answer or attend the damages hearing, thereby admitting liability and waiving any argument about the amount of damages.

The Special Referee denied the motion for a new trial for four reasons:

1. SC OPCO waived a challenge to damages by choosing not to attend the damages hearing after proper notice of it;
2. The default established SC OPCO's liability for breach of contract, which includes the damages provisions;
3. Rule 60(b) and not Rule 59(a) is the proper remedy for a default judgment;

4. The Special Referee conducted a damages hearing, and not a trial.

(R. pp. 33-34). Reasons 1, 3, and 4 are not challenged on appeal.

The Special Referee rejected the argument that SC OPCO did not know about the contract or its terms for three reasons:

1. The default established SC OPCO's liability for breach of contract, which includes the damages provisions;

2. The evidence supports a finding that it knew about the contract, even without Sheri Boyles's knowledge, and, regardless;

3. The law supports finding Sheri Boyles's actual knowledge is imputed to SC OPCO when it retained her as an employee after purchasing the facility.

(R. pp. 34-35).

The Special Referee found successor liability is not at issue for three reasons:

1. The original ruling denying the motions for a new trial and to set aside the judgment was not based on successor liability but, instead, on SC OPCO's conduct and knowledge;

2. Successor liability goes to SC OPCO's liability for breach of contract, which is already established by virtue of its default; and

3. Because SC OPCO did not give Lowcountry notice of its purchase but continued accepting Lowcountry's services, it is barred by equitable estoppel from arguing it is not bound to the contract.

(R. p. 35). Reason 3 is not challenged on appeal.

The Special Referee found the early termination fee is a proper damage for four reasons:

1. SC OPCO waived a challenge to damages by choosing not to attend the damages hearing after proper notice of it;

2. The default established SC OPCO's liability for breach of contract, which includes the damages provisions;

3. Evidence of SC OPCO's nonpayment after repeated invoices from Lowcountry shows that SC OPCO terminated the contract; and

4. The early termination fee is not disproportionate to the unpaid invoices amount where there is no law requiring proportionality and the total value of the five-year contract is twice the early termination fee.

(R. pp. 35-36). Reason 1 is not challenged on appeal.

The Special Referee held the amount of damages is equitable for two reasons:

1. The default established SC OPCO's liability for breach of contract, which fully supports the damages and makes it unnecessary to address equitable damages for quantum meruit; and

2. Equity law supports the full amount of damages where SC OPCO refused to pay invoices for months, benefitting from the time value of money and operating its facility without payment.

(R. pp. 36-38).

The Special Referee denied the Rule 60(b), SCRCP, motion for four reasons:

1. It correctly addressed mistake of fact as the only ground for good cause because that is the only ground that SC OPCO argued, regardless;

2. SC OPCO's receipt of service and choice not to respond to the lawsuit prohibit finding any other ground for good cause;

3. SC OPCO's argument that correspondence Lowcountry sent to other Defendants caused its alleged mistake of fact is incorrect because correspondence to another party cannot change the legal requirement for SC OPCO to file an answer;

4. Even if good cause existed, the other factors weigh against granting relief because

    a. SC OPCO's motion for relief from the judgment was untimely because it knew about the lawsuit and damages hearing but waited until after the judgment to assert its position;

    b. There is no meritorious defense to the payment of invoices because SC OPCO admits it owes for the services;

    c. It would prejudice Lowcountry to vacate the default.

(R. pp. 38-40). Reasons 1, 4.b., and 4.c. are not challenged on appeal.

Finally, the Special Referee upheld the attorney's fee award for seven reasons:

1. SC OPCO waived a challenge to damages by choosing not to attend the damages hearing after proper notice of it;

2. The default established SC OPCO's liability for breach of contract, which includes the attorney's fees damage provision;

3. Lowcountry properly pled attorney's fees in the complaint;

4. The evidence supports finding SC OPCO is bound to the Contract, including the attorney's fees provision;

5. All of counsel's work in collecting payment, including work after the default judgment, is properly included in the fees award;

6. The court properly analyzed the *Glasscock* factors to decide reasonableness and did not rely solely on the contingency fee agreement; and

7. The evidence supports the amount of the fees award and the law allows for a fee award that exceeds the actual damages recovery.

(R. pp. 40-42). Reasons 1, 3, and 5 are not challenged on appeal.

SC OPCO filed this appeal on January 2, 2024.

STANDARD OF REVIEW

"[T]he power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.* at 49-50, 610 S.E.2d at 845 (internal quotation marks omitted).

"When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).

ARGUMENT

At the heart of this appeal is whether a party-defendant named in a lawsuit who receives proper service may choose not to file an answer to a complaint based on its subjective belief that it did not need to respond, and then get out of default based on that belief. The answer is, of course, "no" because any other answer would upend the Rules of Civil Procedure and be contrary to

established case law. The 30-day time to file an answer was SC OPCO's opportunity to respond to this lawsuit. Silence is not a legally acceptable response to personal service of a summons and complaint that names you as a defendant. Having chosen not to respond (or even contact counsel or the court within that time frame), SC OPCO must face the consequences of default.

Even on the merits, the facts cannot support relief from default. SC OPCO is the entity that owned and operated the facility when the linen services at issue were provided. The unpaid invoices are its responsibility. It has never provided an explanation for how it could receive weekly, essential linen services for four months, choose not to pay 50 invoices it received, and then believe that it does not need to respond to a lawsuit seeking payment of those invoices. SC OPCO admits liability for the unpaid invoices yet still argues it made a "mistake of fact" in believing it did not need to respond to a lawsuit to collect payment for those invoices.

SC OPCO waived many of its challenges and is bound by the law of the case that it chose not to appeal. It does not demonstrate any abuse of discretion by the Special Referee. This Court should affirm the Judgment and remand for a determination of the additional damages in fees, costs, and interest during this appeal.

I. The Special Referee properly exercised his discretion to deny SC OPCO's Rule 60(b) motion.

A "court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), SCRCP.[4] SC OPCO argues it made a mistake of fact under Rule 60(b)(1) that "no response [to

[4] SC OPCO states its "position" that Rule 55(c) applies because, when it filed its motion, "the Judgment had not yet been entered on the Public Index." (Br. of App. p. 15). Because SC OPCO does not state this as a separate issue on appeal, the Court should not consider it. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). There is also no argument or citation to authority. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on

the Complaint] was necessary" because it was not a party to the Contract for Lowcountry's linen services. (Br. of. App. pp. 15-16).

"In determining whether a default judgment should be set aside under Rule 60(b)(1), the promptness with which relief is sought, the reasons for the failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties are relevant." *Tobias v. Rice*, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct. App. 2008) (internal quotation and alteration marks omitted). When a party fails to put forth a satisfactory explanation for the default under Rule 60(b)(1), there is no need to address these factors. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013).

The Special Referee correctly found there is not a mistake of fact that warrants relief under Rule 60(b)(1) and, regardless, SC OPCO failed to meet the other relevant factors for relief from a default judgment. (R. pp. 19-42).

A. The Special Referee correctly held SC OPCO did not make a "mistake of fact" when it consciously chose not to file an answer.

The Special Referee held that SC OPCO's alleged belief that it did not need to answer the Complaint was unreasonable, not credible, an intention rather than a mistake, and, even if a mistake, a mistake of law rather than a mistake of fact. The law and record fully support these findings, and this Court should affirm.

It is undisputed that SC OPCO was properly served with the Summons and Complaint. That alone is sufficient to find an absence of mistake of fact. The requirement to answer a

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appeal and therefore not presented for review."). Even if the Court could consider it, SC OPCO is wrong. The file stamp on the Judgment is "2023 May 12." (R. p. 11). SC OPCO filed its motion to set aside the judgment on May 25. Therefore, the Special Referee correctly ruled that Rule 60(b), SCRCP, applies. *See Campbell v. City of N. Charleston*, 431 S.C. 454, 460, 848 S.E.2d 788, 792 (Ct. App. 2020) ("Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP.").

complaint is not a fact—it is the law. Rule 12(a), SCRCP. "[F]ailure to understand the legal process is not excusable neglect under Rule 60(b)." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001); *see also Hillman v. Pinion*, 347 S.C. 253, 257, 554 S.E.2d 427, 429 (Ct. App. 2001) ("[B]ecause this is a mistake of law, not fact, we find this is not the type of mistake, surprise, inadvertence, and excusable neglect generally contemplated by Rule 60(b)(1)."). "It is always a matter of regret that a party should not have his day in court. However, . . . [where] the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint. . . ." *Hill*, 345 S.C. at 310, 547 S.E.2d at 897 (quoting *Williams v. Ray*, 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958)).

The evidence supports the Special Referee's holding that any "mistake" was not credible or reasonable. (R. pp. 22-25). SC OPCO should have expected a lawsuit in this case because it ignored 50 invoices sent over four months. SC OPCO is a sophisticated, multi-state entity that is subject to state and federal regulations. At the time this case was filed and served, SC OPCO had just been served with legal process in another case. (R. pp. 100-108). The Complaint alleges the breach of contract action against "All Defendants." (R. p. 45). The summons says that SC OPCO is "required" to answer and failure to answer will result in default judgment. (R. p. 43). These all support the Special Referee's holding that "SC OPCO's own conscious choice to ignore valid legal process does not warrant relief under Rule 60(b)." (R. p. 24).

SC OPCO points to 4 things in support of its argument—it is not a party to the Contract, it purchased assets and not liabilities, it is not the "primary defendant," and it received letters addressed to other defendants regarding the lawsuit. (Br. of App. pp. 15-16). None of these alter

the law that requires a properly served, named defendant to answer a lawsuit. Further, SC OPCO fails to cite a single authority finding mistake of fact in a similar situation.[5]

First, that SC OPCO is or is not a party to the Contract has nothing to do with whether it is required to file an answer. A defendant who believes that it is not a proper party or that a cause of action filed against it is wrong must file an answer or a motion to dismiss. Rule 12, SCRCP. It cannot ignore the complaint based on a subjective belief of the merits of the lawsuit.

Second, that SC OPCO purchased assets and liabilities has nothing to do with whether it is required to file an answer, for the same reason stated above. Further, it is a legally incorrect argument in this scenario. The "liabilities" at issue are those of SC OPCO—not of a predecessor. The linen services were provided to the facility when SC OPCO owned it. SC OPCO is liable for those services. Regardless, the Court should affirm on this argument under the law of the case. The Special Referee held that, because SC OPCO did not give Lowcountry notice of its purchase and accepted the linen services under the Contract, it is bound to it under equitable estoppel. (R. p.35). Because SC OPCO did not appeal that ruling, it is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

Third, there is no such thing as a legal distinction between a "primary defendant" and any other defendant. (Br. of App. p. 16). SC OPCO is named as a defendant and is required to answer. Rule 12, SCRCP.

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[5] The sole authority SC OPCO cites in its mistake argument is *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986). (Br. of App. pp. 15-16). That case is distinguishable. Galvin received service of process on March 3 but "mistakenly" told his attorney he received it on March 4. *Id.* at 60, 339 S.E.2d at 524. The attorney used that date to calculate the time for serving an answer but actually served it a day late. *Id.* If March 4 had been correct, the answer would have been timely. *Id.* The date a defendant received service is a fact, and the defendant in *Columbia Pools* actually filed an answer and believed its answer was timely. In stark contrast to that case, SC OPCO purposefully chose not to respond at all.

Fourth, correspondence sent to other defendants is irrelevant to SC OPCO's legal obligation to answer the Complaint. The Special Referee correctly held "[t]he alleged mistake of fact is failing to file an answer" and "[n]othing about correspondence or service on another party affected SC OPCO's ability to answer or appear." (R. p. 39). This case is not about what notices were given to any other party or where those notices were sent. It is, and can only be, about what notice was given to SC OPCO and whether it properly responded.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). SC OPCO failed to meet this burden. Because the Special Referee's decision is supported by the law and evidence, there is no basis to find an abuse of discretion, and this Court should affirm the holding that SC OPCO failed to prove a mistake of fact under Rule 60(b). This would make it unnecessary for the Court to address the remaining factors discussed below. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013).

B. The Special Referee correctly held SC OPCO did not promptly seek relief.

The Special Referee found that SC OPCO knew about the lawsuit on January 6, 2023, and knew about the default and damages hearing on March 30, 2023, but waited until May 25, 2023—after judgment—to seek relief. (R. pp. 25-26). In finding a failure to act promptly, the Special Referee relied on the law that a "party has a duty to monitor the progress of his case." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001).[6]

SC OPCO argues it acted promptly because it found out about the entry of default on May 10, 2023, and filed a motion to set aside default on May 23. (Br. of App. p. 17). It does not cite

[6] SC OPCO does not argue on appeal that it did not know about the lawsuit, it only says it "learned of the ***status*** of the litigation through counsel." (Br. of App. p. 7) (emphasis added).

legal authority for this argument. *Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018) ("When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue.").

Regardless, the Rules of Civil Procedure and the law "do not allow a party to ignore the legal process and then ask for relief when it does not like what happened in its intentional absence." (R. p. 26). SC OPCO does not meet its burden to show that the Special Referee abused his discretion under the facts of this case, and this Court should affirm the finding that it failed to promptly seek relief.

C. The Special Referee correctly held SC OPCO does not have a meritorious defense.

SC OPCO argues it has a meritorious defense because it was not in privity of contract with Lowcountry when the Contract was entered into before SC OPCO purchased the facility. (Br. of App. p. 18). The Special Referee held SC OPCO has no defense to payment of the invoices and that alone supports finding it has no meritorious defense. (R. p. 39). He also held that it accepted services under the Contract with knowledge of it. (R. pp. 26-28). SC OPCO fails to show an abuse of discretion in those rulings.

As an initial matter, the Court should affirm under the law of the case. In the Order denying SC OPCO's motion to set aside the default judgment, the Special Referee held: "Contract or no contract, SC OPCO has no meritorious defense to payment of the invoices for services received and for the unreturned linens." (R. p. 26). In the Order denying SC OPCO's motion to reconsider, the Special Referee repeated that holding and stated: "The absence of a meritorious defense to payment of invoices alone supports the rulings on mistake of fact and a meritorious defense." (R. p. 39). SC OPCO does not challenge those holdings on appeal, and they are the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

SC OPCO focuses only on breach of contract and ignores the quantum meruit action, as to which it "is not challenging the award of damages in the amount of the unpaid invoices for services actually received." (Br. of App. p. 20 n.8). If it has no challenge to those damages, then it lacked a mistake and meritorious defense and should have filed an answer.

On the merits of privity, the argument is off-point because the Special Referee did not rule based on privity of contract. The Special Referee explained he "ruled based on SC OPCO's own conduct in accepting the services with knowledge of the contract and its terms." (R. p. 35).

The Court should affirm the ruling that SC OPCO does not have a meritorious defense.

D. There is no successor liability issue in this case.

In ruling on SC OPCO's motion to reconsider, the Special Referee plainly stated: "The Court did not make a ruling based on successor liability." (R. p. 35). Therefore, this entire issue on appeal is moot.

Even if the Court considers the argument, an analysis of SC OPCO's arguments shows that they are irrelevant to the facts of this case.

SC OPCO cites to law about holding a successor company liable "for the debts of a predecessor company." (Br. of App. pp. 18-19). This case is not about a predecessor company's debts, it is about SC OPCO's debts incurred while SC OPCO owned the facility.

SC OPCO complains that the Special Referee rejected Neuman's assertion that it did not know the Contract terms. (Br. of App. p. 20). The Special Referee explained in detail that SC OPCO accepted the services for at least six months after buying the facility, it employed Neuman to deal with contracts and invoices, actually paid invoices, received invoices it refused to pay, and continued to employ the same facility administrator who negotiated the Contract under which it continued to receive essential, daily linen needs. (R. pp. 26-27). The Special Referee's decision

to reject Neuman's assertion of lack of knowledge in the face of that evidentiary support is not an abuse of discretion. *Cf. Fassett v. Evans*, 364 S.C. 42, 49-50, 610 S.E.2d 841, 845 (Ct. App. 2005) (stating an abuse of discretion occurs when an order "is without evidentiary support" (internal quotation marks omitted)).

SC OPCO complains that the Special Referee imputed Sheri Boyles's knowledge of the Contract to it and criticizes his citation to *Equitable Tr. Co. v. Columbia Nat'l Bank*, 145 S.C. 91, 142 S.E. 811 (1928). (Br. of App. pp. 20-21). The criticism is unfounded. In *Equitable Tr. Co.*, the Supreme Court stated:

> The rule now adopted in most jurisdictions is this: ***Any knowledge or information possessed by an agent at the time of acting as agent for a corporation, with respect to the matter upon which he is to act, is notice to the corporation, whenever and however such knowledge or information may have been acquired*** . . . There is no practical distinction between individual knowledge and official knowledge in such cases. In other words, if knowledge is acquired by an agent while not acting for the corporation, but afterwards he acts for the corporation in a matter in which it becomes his duty to communicate the fact his knowledge is imputed to the corporation.

Id. at 114, 142 S.E. at 818 (internal quotation marks omitted) (emphasis added). SC OPCO attacks this authority because it does not discuss imputing knowledge of an employee who then works for a successor corporation. The law cited is not about successor corporations. It is about employee knowledge and when the knowledge is imputed to an employer. Sheri Boyles had actual knowledge of the Contract terms and its existence while she acted as SC OPCO's facility administrator. Therefore, her knowledge is imputed to it.

Further, SC OPCO's argument ignores that the Special Referee held "Boyles's knowledge is not dispositive of SC OPCO's knowledge because . . . it independently knew about and accepted Lowcountry's services." (R. p. 34).

The Special Referee correctly held that successor liability is not at issue, but the evidence and law support that SC OPCO is liable for its own debts under the Contract. If it reaches the merits of this issue, the Court should affirm.

E. The Special Referee correctly held SC OPCO's own conduct accepted the terms of the contract.

SC OPCO states that the Special Referee found it liable under the contract "because it had received services from [Lowcountry] but had failed to pay the corresponding invoices." (Br. of App. pp. 21-22). It never states this proposition is incorrect. *Id.* Instead, it complains only that Lowcountry filed an exhibit in opposition to SC OPCO's motion to reconsider and the Special Referee should not have considered the evidence. (Br. of App. p. 22). The Court should not address this issue because it is raised for the first time on appeal and unpreserved.

If SC OPCO had an objection to the exhibit, it should have raised that objection to the Special Referee. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n 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."). Instead, the Special Referee considered the exhibit without objection. SC OPCO cannot object for the first time on appeal.

Without being sure what the merits of the argument are and how the argument relates to the analysis of Rule 60(b), Lowcountry responds that SC OPCO's conduct in accepting services does support a finding that it is liable under the Contract. "A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct. . . . If it is manifested by conduct, it is said to be implied." *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 399, 368 S.E.2d 686, 687 (Ct. App. 1988). SC OPCO had knowledge of the Contract. It asked for, accepted performance of, and paid for services under the Contract, thus forming a contract by its own conduct. If the Court reaches this issue, it should affirm.

F. Prejudice is established as the law of the case.

The Special Referee held that Lowcountry will suffer prejudice if SC OPCO is granted relief from the default judgment. (R. pp. 28-29, 40). SC OPCO does not challenge these findings of prejudice or make any argument on that factor in its appellate brief. (Br. of App.). Therefore, it is the unappealed law of the case that granting SC OPCO relief under Rule 60 would prejudice Lowcountry. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

The law and evidence fully support the Special Referee's discretionary decision to deny SC OPCO's Rule 60(b) motion, and this Court should affirm.

II. SC OPCO is legally prohibited from challenging the amount of damages.

As an alternative argument, SC OPCO argues that, if the Court does not grant it relief under Rule 60(b), SCRCP, the damages award should be vacated and the case remanded for further proceedings regarding damages. There are two legal prohibitions to this relief.

A. It is the law of the case that SC OPCO waived a challenge to the amount of damages.

The Special Referee held that "SC OPCO waived the right to challenge the amount of damages by admittedly choosing not to appear at the damages hearing." (R. pp. 33, 35, 40). SC OPCO does not appeal that holding. Therefore, it is the unappealed law of the case that it waived the right to challenge damages. *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785. The Court should reject the entire Argument Sections II and III of SC OPCO on this basis alone.

B. It is the law of the case that, if the Special Referee correctly denied the Rule 60(b) motion, then SC OPCO is bound to and cannot challenge the terms of the contract.

The Special Referee held that SC OPCO's "arguments on the amount of damages address liability by asserting different ways that it is not bound to the contract" terms and the "Court cannot

consider liability when SC OPCO is in default, which established that it is bound to the contract and its terms." (R. p. 33); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) ("[T]he defaulting defendant has conceded liability."). It explained SC OPCO could not "attack the enforceability of contract terms and masquerade that as a damages argument." (R. p. 35).

SC OPCO does not appeal that holding. Therefore, it is the unappealed law of the case that it is bound to the contract terms and cannot challenge them as a damages argument. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). The Court should reject the entire Argument Sections II and III on this basis alone.

III. Even if a challenge is considered, the early termination fee award is proper.

If the Court reaches the merits of SC OPCO's early termination damages challenge, it should affirm the Special Referee's award.

A. SC OPCO is bound to the early termination fee damage.

By virtue of default, SC OPCO admits liability for breach of contract. *Solley*, 397 S.C. at 203, 723 S.E.2d at 603. This includes the validity of the contract terms. The Complaint alleges a contract term for an early termination fee "at a depreciated rate of 50% of the rental rate times the number of weeks left in the agreement." (R. p. 49). Because of its default, SC OPCO cannot challenge its liability for the terms of the Contract and breach of it. This alone is a basis for the Court to reject this argument.

B. The early termination provision is legally proper.

SC OPCO asserts that the early termination fee is improper because it is an "unenforceable penalty." (Br. of App. p. 23). It is factually and legally wrong.

The early termination fee is not a "penalty" as SC OPCO argues. Its argument is based on the Special Referee's statement that the Contract included "specified penalties in the events of

non-payment and early termination." (R. p. 19) (Br. of App. p. 24). It automatically equates the use of the word "penalties" to a legal finding of an unenforceable penalty. This is wrong. The Special Referee expressly held that it is not a penalty when it found the early termination fee was not disproportionate to the damages. (R. p. 36).

Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance. *Tate v. Le Master*, 231 S.C. 429, 441, 99 S.E.2d 39 (1957). "When . . . the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." *DD Dannar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 21, 846 S.E.2d 883, 889 (Ct. App. 2020) (internal alteration and quotation marks omitted). "The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." *Id.* at 20, 846 S.E.2d at 889.

Here, the early termination fee is a depreciated 50% of the contract value. That is not disproportionate to the probable damage. The annual value of the contract to Lowcountry was approximately $60,000.00 per year (using the $20,000.00 owed for four months in 2022). SC OPCO terminated the Contract by nonpayment in early 2022, with three years of the term left. That is approximately $180,000.00 of revenue that Lowcountry expected and planned for under the Contract but did not receive. An early termination fee for half of that is not grossly disproportionate by any measure. Lowcountry operated its business and chose what other contracts it could or could not agree to based upon the existence of a five-year obligation.

"[T]he burden is on the party contesting the characterization set forth in the parties' contract to show that a specified sum is actually a penalty." *DD Dannar*, 431 S.C. at 21, 846 S.E.2d at 889. SC OPCO fails to meet this burden. It does not articulate what is disproportionate about the

amount but simply quotes case law for the proposition that $90,000 is disproportionate to any probable damage from a breach. (Br. of App. p. 24). As explained above, an early termination fee of 50% of the full value of the contract is not disproportionate. SC OPCO provides no legal authority that shows error in the Special Referee's finding. This Court should affirm.

Finally, SC OPCO argues that there is not an allegation in the Complaint or evidence of termination. (Br. of App. p. 24). This ignores the undisputed fact that it **refused** to pay repeated invoices for months while still accepting the benefits of the linen services under the Contract. Nonpayment is a breach of contract. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008) (holding the failure to pay an installment is a "substantial breach" that gave the non-breaching party "the right to consider the contract at an end").

The early termination fee, even if contestable despite waiver and the law of the case, is not a penalty. This Court should affirm the Special Referee's award.

IV. Even if a challenge is considered, the attorney's fees award is reasonable.

If the Court reaches the merits of SC OPCO's attorney's fees award challenge, it should affirm the Special Referee's decision.

When "determining a reasonable attorney's fee," the Court considers: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The Special Referee awarded $38,419.45 in attorney's fees. (R. p. 16). In its motion to set aside the default judgment, SC OPCO objected to the fees on the sole basis that the amount is based upon a contingency fee agreement between Lowcountry and its counsel. (R. pp. 70-71). The

Special Referee held that a contingency fee agreement is proper in a breach of contract action. (R. p. 27). The Special Referee also separately analyzed the factors in *Glasscock* "without regard to the contingency fee arrangement" and still found "the award reasonable." (R. p. 28). After considering SC OPCO's arguments in its motion to alter or amend, the Special Referee explained he did not treat the contingency fee arrangement as controlling and "analyzed each factor" under *Glasscock*. (R. p. 28). The Special Referee stated that "attorney's fees evidence was addressed at the damages hearing that SC OPCO chose not to attend. There was evidence of all of the *Glasscock* factors" and SC OPCO "provides no conflicting evidence." (R. pp. 28-29).

The Special Referee did not abuse his discretion, and this Court should affirm if it reaches the merits. [7]

SC OPCO complains about the Special Referee's citation to *Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 161, 503 S.E.2d 483, 489 (Ct. App. 1998), for the proposition that a contingency fee agreement is allowed for attorney's fees in a breach of contract case. (Br. of App. p. 27). It argues that the Special Referee missed the "critical point" that the fee arrangement "did not control the award of attorneys' fees." *Id.* SC OPCO is wrong. The Special Referee addressed this argument, finding it "moot," because the "Court did not treat" the fee arrangement as controlling but, instead, considered the *Glasscock* factors without regard to the fee arrangement. (R. p. 41).

[7] SC OPCO did not appeal the holdings that it cannot contest the attorney's fee provision under the contract because it waived that argument and is bound by the default, Lowcountry properly pled the fees as a damage, and counsel's work done after the default judgment can support the reasonableness of the fee. (R. pp. 40-41). Therefore, those holdings are the law of the case. *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785.

SC OPCO complains that the fee is not supported by the evidence and the amount is almost double the $20,000.00 in invoices. (Br. of App. pp. 26-27). This argument is legally flawed and ignores the full amount of damages.

"[T]here is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment." *Taylor by Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989), as approving "an award of attorney's fees where the fee substantially exceeded the actual recovery"). "The amount of recovery and the contingency of compensation are only two of the six factors to be considered by the trial court in determining an appropriate attorney's fee." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995). Regardless, that is not dispositive of an award of attorney's fees. *Baron Data Sys.*, 297 S.C. at 385, 377 S.E.2d at 297 (noting that "other jurisdictions have awarded attorney fees which exceeded the verdict obtained" and affirming a $26,000.00 attorney's fee for a $16,151.00 judgment). The attorney's fee award is $38,419.45, and the remainder of the judgment is over $115,000.00. (R. pp. 15-16).

The Special Referee found ample evidence to support the award, as noted in his Orders. SC OPCO's dismissal of that evidence without providing any evidence to the contrary is not a sufficient basis for reversal. This is especially true where it consciously chose not to attend the damages hearing to contest any evidence. The law and evidence support the Special Referee's discretionary decision about the amount of attorney's fee award. SC OPCO fails to show an abuse of discretion, and this Court should affirm.

V. SC OPCO's attempt to limit its damages to the invoices amount is not supported by equitable law.

As a last-ditch argument, SC OPCO says it is liable for the amount of the invoices and should only have to pay that exact amount -- $20,311.36. (Br. of App. pp. 28-30). Its chance to pay that exact amount was when it received the invoices. That is long since passed.

Since the 50 invoices that SC OPCO ignored, Lowcountry was forced to hire counsel, pay for litigation, attend hearings and present evidence, defend an appeal, operate its business without a valid contract that it planned to receive income from for five years, operate its business without income it earned with linen services provided, and replace linens that SC OPCO wrongfully kept and refused to pay for. The decision to not pay for services at the time payment is due has legal consequences. All of those consequences were known to SC OPCO, but it chose to risk them in favor of an attempt to float its business operations on the loss to and mistreatment of Lowcountry. *Taff v. Smith*, 114 S.C. 306, 312, 103 S.E. 551, 553 (1920) ("No person shall be allowed to reap the benefits arising from his own wrongful acts.").

SC OPCO cites to equitable principles. It does not have clean hands and cannot invoke equitable principles merely when it suits. *See Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 426 n.1, 746 S.E.2d 35, 38 (2013) ("One of equity's most important aspects is the principle of right and fair dealing, between parties to particular transaction.").

This Court stated the standard for calculating quantum meruit damages.

> If the value of what was received and what was lost were always equal, there would be no substantial problem as to the amount of recovery, since actions of restitution are not punitive. In fact, however, the plaintiff frequently has lost more than the defendant has gained, and sometimes the defendant has gained more than the plaintiff has lost. In such cases the measure of restitution is determined with reference to the tortiousness of the defendant's conduct or the negligence or other fault of one or both of the parties in creating the situation giving rise to the right to restitution. If the defendant was tortious in his acquisition of the benefit he is required to pay for what the other has lost although that is more than the recipient

> benefited. If he was consciously tortious in acquiring the benefit he is also deprived of any profit derived from his subsequent dealing with it.

Stringer Oil Co. v. Bobo, 320 S.C. 369, 373-74, 465 S.E.2d 366, 369 (Ct. App. 1995) (internal quotation marks omitted) (emphasis in original).

The Special Referee correctly held that "[t]his case falls squarely within *Stringer*'s standard." (R. p. 37). SC OPCO's conduct resulted in it gaining much more than the $20,311.36 in Lowcountry's loss for the linens. It gained the time value of the money it retained, the ability to operate its facility on a daily basis for months without payment, and the time value of money in refusing to respond to invoices and proper service of this lawsuit. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 467, 684 S.E.2d 756, 764 (2009). SC OPCO asks this Court to hold that it can float the costs of operating its business to someone else's detriment with no cost to SC OPCO.

SC OPCO still has not paid the amount of the invoices or for the linens it wrongfully kept. It cannot refuse payment for over two years at this point and expect to simply pay the base amounts with no interest and no consideration for the costs and legal fees incurred to try to get it to pay what it has owed all along. That assertion is an abuse of the legal system for the purpose of delaying payment of an admitted debt. The Court should reject this argument and affirm the Special Referee's judgment amount (with all interest, costs, and fees accrued during this appeal).

CONCLUSION

For these reasons, the Court should affirm the Judgment and remand for enforcement of the Judgment, including consideration of an increased award to account for all interest, costs, and fees accrued during post-judgment motions and on appeal.

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

C. Stephen Bennett, Special Referee

Appellate Case No. 2024-000006

Bullard & Son, Inc., d/b/a Lowcountry Medical Linens,……....……..……Respondent,

v.

Ridgeland Nursing Center, Inc., Ridgeland NC, LLC, and SC OPCO, LLC, Defendants,

Of which SC OPCO, LLC is the.……Appellant.

CERTIFICATE OF COMPLIANCE OF RESPONDENT

The undersigned counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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