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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2024-000698

AJP Solutions, LLC Respondent,

v.

Clark Construction, Inc., of Mississippi
TCABC Real Estate Holdings, LLC and
Travelers Casualty and Surety Company
of America, Defendants. Appellant.

Of which Clark Construction, Inc. of Mississippi
is the Appellant.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

This action arises from a payment dispute over a construction project. Clark Construction Inc., of Mississippi ("Appellant") was the general contractor, and AJP Solutions, LLC ("Respondent") was its subcontractor. (App. Br. p. 2). After Appellant failed to pay, Respondent recorded a mechanic's lien and subsequently filed a suit in the Dorchester County Court of Common Pleas to foreclose this lien—Case No. 2022-CP-18-01997 (herein the "Mechanic's Lien Suit"). **(R. pp. 19-23)** (Resp. Br. p. 2).

In lieu of an answer, Appellant filed a motion to compel the Mechanic's Lien Suit to arbitration. **(R. pp. 34-54)**. (App. Br. p. 2). While this motion was pending Appellant attempted to make a claim against a performance bond that had been issued by Arch Insurance Company (herein "Arch" or "Bond Company").[1] This bond claim became the subject of a separate lawsuit between Appellant and Bond Company which was filed with the U.S. District Court for the Southern District of Mississippi—Case No. 5:22-cv-100-ks-bwr (herein the "Bond Suit"). (App. Br. 8-9).

The issues in this appeal concern the interplay between these two suits—*i.e.,* the Mechanic's Lien Suit and the Bond Suit. Importantly, Respondent was not a party to the Bond Suit between the Bond Company and Appellant (which was pending in Federal Court in Mississippi). Likewise, the Bond Company was not a party to the Respondent's Mechanic's Lien Suit against Appellant (which was pending in state court in South Carolina).

On June 22, 2023, the Circuit Court issued an order granting Appellant's motion to stay the Mechanic's Lien Suit and compel arbitration. **(R. pp. 1-6)**. Shortly thereafter, the Bond Company and Appellant participated in a mediation of the bond suit. At that mediation the Bond Company and Appellant (but not Respondent) reached a settlement which the Bond Company and

[1] Arch was never a party to the Mechanic's Lien Suit, nor is it a party to this appeal.

Appellant reduced to a written "Settlement Agreement." *See* **(R. pp. 60-65)**; *see also,* (App. Br. p. 9) (acknowledging the "Settlement Agreement [was] between [the Bond Company] and [Appellant]").

Nonetheless, the terms of that Settlement Agreement purport to provide that Respondent would dismiss and release the claims it made against Appellant in the Mechanic's Lien Suit (which at the time was still pending arbitration). **(R. pp. 60-65)**. However, Respondent did not agree to these terms, and **Respondent did not sign the Settlement Agreement. (R. pp. 60-65)**. Instead, the Bond Company signed the agreement for Respondent, claiming to have a power-of-attorney to do so. **(R. pp. 60-65)**. Respondent did not agree that the Bond Company had the authority to bind it to the settlement or otherwise obligate Respondent to dismiss its Mechanic's Lien Suit against Appellant.

Claiming the Settlement Agreement resolved the Mechanic's Lien Suit, Appellant thereafter sought to enforce the Settlement Agreement against Respondent by filing a motion to dismiss with the arbitrator. **(R. pp. 67-71)**. However, it was not disputed that Respondent neither signed nor agreed to the terms of the Settlement Agreement. Therefore, Respondent opposed this motion asserting, *inter alia,* that the Settlement Agreement was unenforceable against Respondent because it did not sign it, and that the Bond Company did not have the authority to bind Respondent to the Settlement Agreement. **(R. pp. 73-80)**.

On July 28, 2023, the arbitrator issued an order in response to Appellant's motion to dismiss in which the arbitrator made two incongruous findings. **(R. pp. 84-85)**. First, the arbitrator held he did not have the jurisdiction to rule on the validity or enforceability of the Settlement Agreement. But inexplicably, the arbitrator proceeded to find that the Settlement Agreement was binding on Respondent and therefore resolved the claims made in the Mechanic's Lien Suit against Appellant.

(R. p. 84). Therefore, the arbitrator's order directed the arbitration "proceeding is now concluded." **(R. p. 84)**.[2] Respondent filed a motion asking the arbitrator to reconsider, and on August 8, 2023, the arbitrator issued an order denying this motion without considering the merits of the arguments Respondent made therein. **(R. pp. 88-89; 91)** (finding "I am not empowered to re-determine the merits of any claim already decided.").

PROCEDURAL POSTURE

On August 14, 2023, Appellant filed a motion with the South Carolina Circuit Court seeking to dismiss the Mechanic's Lien Suit (that had been stayed for the purpose of arbitration)[3]. **(R. pp. 55-58)**. Respondent filed a memorandum opposing the dismissal and asserting the matter should be remanded back to arbitration. **(R. pp. 175-184)**. A hearing was held on November 27, 2023. **(R. pp. 106-140)**. On January 10, 2024, the Circuit Court issued an order denying Appellant's request to dismiss the Mechanic's Lien Suit and "order[ed] the parties back to arbitration to resolve [Respondent]'s claims against [Appellant]." **(R. pp. 7-13)**. Appellant unsuccessfully moved the Circuit Court to reconsider under Rule 59, SCRCP, and this appeal followed. **(R. pp. 92-105)**.

[2] Although Appellant claims the arbitrator "dismissed" the arbitration, it bears mention that the arbitrator's order does not use the term dismiss. Instead, he finds the arbitration "proceeding has now concluded."

[3] An arbitration which never occurred.

APPELLATE PROCEDURE

The substantive effect of the Order on appeal was to deny Appellant's request to dismiss the Mechanic's Lien Suit, and to direct the parties to arbitration. However, neither an order denying dismissal, nor an order directing the parties to arbitration is immediately appealable. Therefore, on September 6, 2024, Respondent filed a motion with this Court to dismiss the appeal for lack of appellate jurisdiction. On October 1, 2024, this Court issued an Order denying the motion to dismiss but requested the issue of appealability be addressed in the parties' briefs.

ARGUMENTS

This brief is in two parts. Part 1 explains why this Court should dismiss the instant appeal for lack of appellate jurisdiction. Part 2 provides three separate reasons why (even if this appeal is not dismissed) this Court should affirm. First, this Court should affirm under the two-issue rule because Appellant does not appeal the Circuit Court's finding that the Settlement Agreement violated Rule 43, SCRCP. Second, even if this Court were to reach the issues raised by Appellant, many of these issues are not preserved, and/or lack merit. Finally, there are two separate and independent sustaining grounds to warrant affirming: (a) Appellant's lack of standing, and (b) the failure of conditions precedent under the Indemnity Agreement made the Bond Company's attempt to dismiss Respondent's Mechanic's Lien Suit improper, even if the Bond Company had such a right (which it did not).

*

PART 1

A Lack of Appealability / Renewal of Motion to Dismiss Appeal

I. This Court should dismiss the instant appeal because neither an order denying a request to dismiss, nor an order compelling parties to arbitration is appealable.

It is well settled that the appealability of an order is determined by the substantive effect of the order. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 147 (2015) (the analysis of the appealability of an order is based on the actual relief granted and "is not constrained by how the order is styled"); *citing Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.").

In this case the substantive effect of the Order on appeal is plain and unmistakable. It did two things: (1) it denied Appellant's request to dismiss the case, and (2) it instead directed "**the parties are ordered back to arbitration** in order to resolve the claims that [Respondent] asserted against [Appellant]." (Appx. I, at p. 6) (emphasis added). No matter how Appellant may spin it, neither of these findings is immediately appealable.

The court's refusal to dismiss a case is not appealable. *See generally, S.C. Lottery Comm'n v. Glassmeyer*, 428 S.C. 423, 439 n.8, 835 S.E.2d 524, 532 (Ct. App. 2019) (recognizing "the denial of a motion to dismiss is not directly appealable"); *see also, McLendon v. S.C. Dep't of Highways & Pub. Transp.,* 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) (recognizing that "the denial of a motion to dismiss is not directly appealable for the same reasons" that denial of a motion for summary judgment is not directly appealable); *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) ("This Court has repeatedly held that the denial of summary judgment is not directly appealable"); *Watson v. Underwood*, 407 S.C.

443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014) (orders which do not resolve the merits of the case are not immediately appealable); *accord Keels v. Powell*, 213 S.C. 570, 573, 50 S.E.2d 704, 705 (1948) ("An order refusing a nonsuit, or the direction of a verdict, is not appealable").

Similarly, an order directing parties to participate in arbitration is interlocutory, and not immediately appealable. *See Heffner v. Destiny, Inc*., 321 S.C. 536, 538, 471 S.E.2d 135, 136 (1995) (finding that an order "compelling arbitration is not immediately appealable under the federal statute."); *Johnson v. Paraplane Corp.*, 321 S.C. 316, 317 n.1, 468 S.E.2d 620 (1996) (finding "an order compelling arbitration is not immediately appealable."); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 610 n.3, 586 S.E.2d 581, 584 (2003) (holding "a South Carolina court's order compelling arbitration is not immediately appealable").

Therefore, because the Circuit Court's rulings are interlocutory, this Court should dismiss the instant appeal for lack of appellate jurisdiction. *See e.g., Brown v. Greenwood Sch. Dist. 50 Bd. of Trs.*, 344 S.C. 522, 524-25, 544 S.E.2d 642, 643 (Ct. App. 2001) ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to the [appellate] court . . .") *citing, South Carolina Pub. Serv. Auth. v. Arnold,* 287 S.C. 584, 586, 340 S.E.2d 535, 536 (1986).

In its brief, Appellant seemingly assumes this to be an appeal from an order denying confirmation of an arbitration award based on nothing more than the fact that Appellant captioned its motion as one to "Confirm an Arbitration Order."[4] *See* (App. Br. p. 2) (Appellant claiming this to be an appeal from the decision to "(1) deny [Appellant's] Motion to Confirm Arbitration Award;

[4] Although the title of a motion is not determinative, it bears mention that Appellant's motion was entitled Motion to Confirm Arbitration *Order,*" and not a motion to confirm an arbitration *award. See* **(R. p. 55)** (italics for distinction between order and award). Moreover, S.C. Code Ann. §15-48-120 which concerns a motion to confirm an arbitration award is referenced nowhere in Appellant's motion. *See* (*Id.*).

and (2) ordering this matter back to arbitration."); *see also* (App. Br. pp 12-13) (Appellant asserting the motion "before the trial court was a Motion to Confirm an Arbitration Award" pursuant to S.C. Code Ann. §15-48-120).

However, the title of Appellant's motion does not change the analysis regarding appealability. It is well-settled that the nature of a motion is determined by its substance, not its title; and "[o]ur courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability." *Thornton*, 391 S.C. at 303, 705 S.E.2d at 478; *see e.g., Collins Music Co. v. Igt*, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002) (finding that for the purpose of determining whether an appeal was properly taken, the appellate court should treat the motion "based on its substance and effect rather than how it is captioned by [the] movant") (internal quotations omitted); *Mickle v. Blackmon*, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (finding that "although plaintiff styled her motion as one for 'Partial Summary Judgment' it was, in substance and effect, a [different] motion" and treated it accordingly).

The substance of the motion Appellant filed with the Circuit Court leaves little doubt this matter arises from a motion to dismiss, **not** a motion to "confirm an arbitration award." Not only did Appellant concede there was no arbitration "award," it is also explained the relief requested was dismissal, and not entry of a judgment. *See* **(R. p. 57, ¶ 13)** (Appellant conceding "Because the claims by and among [Appellant] and [Respondent] have been resolved through settlement and because the underlying arbitration has been dismissed **without issuance of an award** to either of the Parties, [Appellant] **does not seek civil judgment** against [Respondent] **but instead seeks a dismissal** of this lawsuit with prejudice.") (emphasis added); *accord e.g., Standard Fed. Sav. & Loan Ass'n v. Mungo,* 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (explaining that it is the

substance of what is sought that matters regardless of the form in which the request for relief was framed). This should end the discussion. But there is more.

Appellant also concedes that the dismissal it seeks is not because the merits of the Mechanic's Lien Suit were resolved by the arbitrator, but instead because the Mechanic's Lien Suit was purportedly resolved by the Settlement Agreement. *See* **(R. p. 118)**. (Appellant stating: "**The arbitration has determined there is no []liability based on the settlement and release. So what we are asking the Court to do is to dismiss** this case with finality."); *see also* **(R. p. 135)**. (Appellant arguing: "We are simply asking the Court to look at the arbitrator's order, **look at the Settlement Agreement where the claims were released**, and confirm it **and dismiss the case**.") (all emphasis added).

These admissions matter because our Supreme Court has recognized that "[a]**n arbitration award is distinguishable from a settlement**, as an arbitrator's award constitutes a third-party finding of fault on the claims asserted by the plaintiff." *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 451 n.5, 748 S.E.2d 221, 227 (2013); *see also Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 495, 593 S.E.2d 480, 485 (Ct. App. 2004) (explaining generally that an arbitration award presumes a resolution on the merits of the disputed issues that the parties agreed to submit to arbitration). As such this serves to further demonstrate that Appellant's motion, which precipitates this appeal, was not (and could not have been) properly considered as a motion to confirm an arbitration award for the simple fact that there was no "award" in the eyes of the law.[5]

Finally, it should not be forgotten that it was Appellant (not Respondent) that initially requested this matter be compelled to arbitration for the resolution of Respondent's claims. Yet,

[5] Respondent made this point to the Circuit Court, explaining: "Now, there was no award ever issued in this case. It was literally just an order that the arbitrator filed due to the purported settlement [agreement]." **(R. p. 119)**.

the merits of those claims were never decided. Instead, the findings from the arbitration can be distilled to two points: (1) there is a document alleged to be a Settlement Agreement that was purportedly executed between Appellant and Bond Company (who was *not* a party to the arbitration); and (2) whether that purported Settlement Agreement had any force and effect could not be determined by the arbitrator because it was beyond the arbitrator's jurisdiction to decide. Simply, and properly viewed, the arbitration decided *nothing* with regard to the merits of Respondent's claims against Appellant. In fact, it did not even decide whether the purported Settlement Agreement affected those claims because the arbitrator admittedly lacked jurisdiction to do so. Because there has been no final decision on Respondent's claims, this appeal is premature. *See e.g., Watson*, 407 S.C. at 456, 756 S.E.2d at 162 (orders which do not resolve the merits of the case are not immediately appealable).

At bottom, no matter how Appellant may spin it, the most fundamental problem with its appeal remains. The Order on appeal has the very limited (and non-final) effect of refusing to dismiss the case and compelling the parties to arbitrate the merits of their claims. Neither of these findings present an appealable decision from the court. *See e.g., Johnson*, 321 S.C. at 317 n.1, 468 S.E.2d at 620 (finding "an order compelling arbitration is not immediately appealable."); *and Glassmeyer*, 428 S.C. at 439 n.8, 835 S.E.2d at 532 (recognizing "the denial of a motion to dismiss is not directly appealable"); *see also, McLendon,* 313 S.C. at 526 n.2, 443 S.E.2d at 540 (recognizing that "the denial of a motion to dismiss is not directly appealable for the same reasons" that denial of a motion for summary judgment is not directly appealable); *accord Watson*, 407 S.C. at 456, 756 S.E.2d at 162 (orders which do not resolve the merits of the case are not immediately appealable).

Therefore, this Court should dismiss the instant appeal.

**

PART 2

Even if this Court does not dismiss, it should still affirm.

Even if this Court does not dismiss the instant appeal, it should nonetheless affirm the Circuit Court's ruling for three reasons. First, Appellant's have not appealed the Circuit Court's finding the Settlement Agreement failed to comply with Rule 43, SCRCP, and under the two-issue rule, this unappealed ruling requires affirming. Second, even if this Court were to reach the merits of Appellant's arguments, these arguments are neither preserved, nor are they compelling. Finally, there are two independent sustaining grounds on which this Court can and should affirm.

II. This Court should affirm under the two-issue rule because Appellant does not appeal the Circuit Court's ruling regarding Rule 43, SCRCP.

Appellant's request to dismiss was based on the Settlement Agreement entered between Appellant and Bond Company. The Circuit Court denied this motion for two enumerated reasons, one of which being: "**The purported settlement [agreement] violates Rule 43(k) of the South Carolina Rules of Civil Procedure." (R. pp. 11-12)** (bold in original). However, Appellant has not appealed this ruling.

"Under the two-issue rule, whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) *see e.g., Anderson v. S.C. Dep't of Highways & Pub. Transp.,* 322 S.C. 417, 420 n.1, 472 S.E.2d 253, 255 n.1 (1996) ("For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the 'two issue' rule if the plaintiff failed to appeal both grounds[.]"). An "unchallenged ruling, right or wrong, is the law of the case" and this "unappealed ruling becomes the law of the case and

the appellate court must assume the ruling was correct." *Town of Mount Pleasant v. Jones*, 335 S.C. 295, 299, 516 S.E.2d 468, 470 (Ct. App. 1999).

Because Appellant has failed to appeal the Circuit Court's ruling regarding Rule 43(k) SCRCP, this Court should affirm. *See id.*

III. Even if this Court does not apply the two-issue rule, it should still affirm because Appellant's arguments are neither preserved nor compelling.

On appeal, Appellant raises three arguments. Because this Court should either dismiss the appeal or affirm under the two-issue rule, it need not consider these arguments. However, for the sake of completeness only, Respondent explains why even if this Court were to consider Appellant's arguments, it should still affirm.

A. Appellant's argument regarding the timeliness of Respondent's objection to the arbitrator's order is not preserved.

Here, Appellant's first issue on appeal asserts that Respondent failed to timely object to the confirmation of the arbitrator's award. However, this argument is not preserved because Appellant raised this argument for the first time in its Rule 59(e) motion. **(R. pp. 97-100)**.

It is well settled that "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review, [and these rules provide] a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to [ruling] but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). "**A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion**." *Mailsource, LLC v. M. A. Bailey & Assocs.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App.

2003) (emphasis added). Because this argument is not preserved it cannot stand as a basis to reverse the Circuit Court's ruling.

Furthermore, even if this issue were preserved (which it is not) it is without merit. While the State Uniform Arbitration Act provides deadlines for making objections to the imposition of an arbitration *award*, those deadlines are not implicated here for the simple reason that the arbitrator's order was not an "award." *See* (*supra* at Part 1). This is a fact that Appellant conceded in the motion it filed with the Circuit Court, stating: "because the underlying arbitration has been dismissed **without issuance of an award**…." [Appellant] **does not seek civil judgment** against [Respondent] **but instead seeks a dismissal**…." **(R. p. 57)**. This point if further alluded to in the title of Appellant's motion which it styled "Motion to Confirm Arbitration *Order*" rather than a Motion to Confirm an Arbitration *Award*. **(R. p. 55)** (italics for distinction); *contra* S.C. Code Ann. §15-48-120 (the Uniform Arbitration Act contemplating a motion for confirmation of an *award* but not contemplating confirmation of an *order.*). Thus, it defies logic how Appellant could claim that Respondent was required to object to an arbitration award, when Appellant itself concedes there was no such award to object to. Accordingly, even if this argument were preserved (which it is not) it should still fail, and this Court should affirm.

B. Appellant's argument that the Circuit Court exceeded its jurisdiction by evaluating the propriety of the Settlement Agreement and Indemnity Agreement is meritless because Appellant specifically invited the Court to address this issue.

In its second issue on appeal, Appellant suggests that Circuit Court erred by applying the incorrect standard of review (*i.e*., the manifest disregard standard) when considering the validity of the Settlement Agreement upon which the arbitrator's order was based. It seems Appellant claims the Circuit Court erred by exceeding the scope of what was properly before it by considering the validity and prejudicial effect of the Settlement Agreement. (App. Br. pp. 17-21).

As a threshold matter, it does not appear that the arguments in Section II of Appellant's brief relate to any actual ruling made in the order on appeal. Instead, the argument heading in this section of its brief seems to indicate that Appellant takes exception with something it believes was "implied" by the Circuit Court rather than any explicit ruling. *See* (App. Br. p. 17) (describing the error to have occurred "when the trial court **implied** that the arbitrator manifestly disregarded the law governing the validity of the Settlement Agreement") (emphasis added).

However, Appellant does nothing to explain where or how this alleged "implication" appears in the order on appeal—presumably because it does not. Instead, Appellant indicates that its argument is directed at an oral comment made by the Circuit Judge that *implied* the arbitrator's ruling prejudiced Respondent. *See* (App. Br. p. 20) (claiming, at Section II (B) of Appellant's brief, that it raises the argument because "During the hearing on [Appellant's motion] the Trial Court expressed concern about the failure of [Respondent] to be able to prosecute its claim against [Appellant.].").

As a point of fact, any concern the Circuit Judge may have voiced about the prejudice the arbitrator's order caused to Respondent's right to litigate the Mechanic's Lien Suit is very valid. However, the larger point is that this "concern" does not appear as the basis for the findings expressed in the order on appeal. Thus, Appellant's argument is simply not germane to the final ruling of the Circuit Court, and as a result not germane to any issue before this Court. *Contra e.g., Ford v. State Ethics Comm'n,* 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (explaining an oral ruling is not final, instead "[t]he written order is the trial judge's final order and as such constitutes the final judgment of the court").

This point aside, as best Respondent can interpret Appellant's argument, it seems the thrust is that it was purportedly error to apply the "manifest disregard" standard to the question of the

validity of the Settlement Agreement because (at least according to Appellant) the validity of the Settlement Agreement was outside the scope of the arbitration agreement. In other words, Appellant claims that because there was no agreement to arbitrate the validity of the Settlement Agreement, the Circuit Court has no ability to review whether the arbitrator committed a manifest disregard of the law when he dismissed the arbitration based on the conclusion that the Settlement Agreement was valid and binding on Respondent. However, the fatal flaws in this argument are innumerable. Not only is this point, waived and/or unpreserved, it also makes no logical sense. If the validity of the Settlement Agreement was not arbitrable, then of course the arbitrator committed a manifest disregard of this point when he resolved the dispute over the validity of the Settlement Agreement in the arbitration. Appellant seemingly argues in circles.

(i) Appellant's claim that the Circuit Court applied the wrong standard or exceeded its authority is unpreserved and/or waived because Appellant invited the Court to do the very thing it now complains of.

Our courts have held "issue preservation requires that the objection in the trial court must have been made by the party who raises the issue in the appellate court." *Gaddy v. Douglass*, 359 S.C. 329, 348, 597 S.E.2d 12, 22 (Ct. App. 2004) *citing* Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina at 63 (2d Ed. 2002); *Herron v. Century BMW,* 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.").

Here, Appellant never raised the argument that the "manifest disregard" standard was not applicable to the issues before the Circuit Court. Quite the contrary, at the hearing on its motion, Appellant explicitly told the Circuit Court: "Essentially, **what we have is a manifest disregard standard**. In other words, an arbitrator's decision will not be disturbed by the court unless a party can show that the arbitrator manifestly disregarded clearly applicable law." **(R. p. 108)** (emphasis

added). To "summarize our position" Appellant explained "[t]here is **no indication that there was any manifest disregard** when the arbitrator rejected [Respondent's] arguments." **(R. p. 117)** (emphasis added).

Appellant waived any claim that the Circuit Court applied the wrong standard or exceeded its authority by considering the validity of the Settlement Agreement because Appellant specifically invited the Circuit Court to do precisely what Appellant now claims to be improper.

It is generally accepted that a party cannot be heard to complain on appeal of an error he invited upon himself. *See Hillman v. Pinion,* 347 S.C. 253, 257, 554 S.E.2d 427, 430 (Ct. App. 2001) (stating an appellant "will not be heard to complain on appeal of an error he voluntarily committed before the trial court"); *citing State v. Babb*, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989) ("a party cannot be heard to complain of an error his own conduct induced").

During the hearing before the Circuit Court, Appellant specifically clarified that its motion was asking the Court to confirm that the Settlement Agreement mandated dismissal of the case. Appellant stated: "We are simply asking the Court to look at the arbitrator's order, **look at the Settlement Agreement where the claims were released**, and confirm it and dismiss the case." **(R. p. 135)** (emphasis added). Plainly, Appellant invited the Circuit Court to consider the validity of the Settlement Agreement. Therefore, Appellant cannot (and should not) be heard to complain that the Circuit Court erred by doing the very thing Appellant invited. Therefore, this Court should find that the arguments advanced by Appellant here are waived.

(ii) Even if Appellant's argument is preserved and not waived, it is illogical.

Even if not waived, Appellant's argument is fatally illogical. As best it can be interpreted, Appellant claims that because the validity of the Settlement Agreement was not subject to arbitration, it necessarily follows that the Circuit Court's consideration of the arbitrator's order

(which was plainly based upon the arbitrator's assumption that the Settlement Agreement was valid and binding), was not subject to the "manifest disregard" standard.

However, this reasoning is fatally circular. If the propriety of the Settlement Agreement was outside of the scope of what was arbitrable, then it follows that the arbitrator was likewise outside the scope of his jurisdiction when he issued an order based upon his assumption that the Settlement Agreement was valid—particularly where Respondent objected to the validity and enforceability of the Settlement Agreement.

Appellant asked the arbitrator to dismiss the arbitration of the Mechanic's Lien Suit based on the Settlement Agreement. In the face of Respondent's objection to the validity of the Settlement Agreement, there is no way to interpret the arbitrator's order as doing anything other than ruling on the validity of the Settlement Agreement. In subsequently asking the Circuit Court to dismiss the Mechanic's Lien Suit, based on the arbitrator's order, Appellant acknowledged that the arbitrator necessarily ruled on the arguments concerning the validity and enforceability of the Settlement Agreement. *See* **(R. p. 118)** (Appellant stating: "The arbitration has determined there is no []liability **based on the settlement** and release. So what we are doing is asking the Court to do is to dismiss this case with finality.") (all emphasis added); **(R. p. 116)** (Appellant stating Respondent made 5 arguments concerning the validity of the Settlement Agreement and conceding that "arguments 2 through 5 [. . .] have been considered by the arbitrator and rejected.") *see also* **(R. p. 117)** (Appellant stating: "And so, I guess, to summarize our position, it is that the arguments that [Respondent] is making before the Court today have been considered by the arbitrator. [And] there is no indication there was any manifest disregard when the arbitrator rejected those arguments.").

Despite having previously claimed the arbitrator resolved any dispute about the validity and enforceability of the Settlement Agreement (and did so in a manner that did not amount to a manifest disregard), Appellant now takes the incongruous position that issues concerning the enforceability of the Settlement Agreement were not arbitrable. It cannot be both ways. If the propriety of the Settlement Agreement was not arbitrable then it follows that the arbitrator exceeded his jurisdiction when he resolved the arbitration based on his conclusion that the Settlement Agreement was enforceable, and thus committed a manifest disregard of the law in doing so. In this way, Appellant is hoisted by its own petard.

Therefore, even if this argument is preserved and not waived, it serves only to demonstrate why the Circuit Court was correct in denying Appellant's motion to dismiss.

C. Appellant's argument that the power of attorney created by the Indemnity Agreement is exempted from the Power of Attorney Act is wrong because the Indemnity Agreement does not assign the right to prosecute or dismiss Respondent's claims. Moreover, even if it did, the right to dismiss a suit does not provide any security, and therefore cannot logically be accompanied by a security interest.

The Uniform Power of Attorney Act, ("UPAA") provides that a power of attorney must be attested to by two witnesses. S.C. Code Ann. § 62-8-105. However, this two-witness requirement is excused where the power is coupled with an interest in the subject of that power. *See* S.C. Code Ann. § 62-8-103(1) (providing the UPAA "applies to all powers of attorney except: a [] power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction.").

In this case, there is no dispute that the Indemnity Agreement does **not** comply with the two-witness requirement of the UPAA. **(R. p. 71)**. However, Appellant asserts this two-witness requirement is excused under the exception provided in § 62-8-103(1) because Paragraph 7 of the

Indemnity Agreement provides the Bond Company's purported power to dismiss the Mechanic's Lien Suit was coupled with an interest.[6]

Paragraph 7 of the Indemnity Agreement provides as follows:

> **Power of Attorney**: [Respondent] irrevocably appoints [Bond Company] as attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of [Respondent] assigned to [Bond Company] above and to execute on behalf of and sign [Respondent's] name to any document deemed necessary by [Bond Company] to give full effect to the purpose of the agreement. [Respondent] hereby ratifies all acts taken by [Bond Company] as attorney-in-fact, acknowledges that this power of attorney is a power coupled with an interest, and agrees to hold harmless [Bond Company] from any claims, damages, loss or expense incurred by its use.

(R. p. 71).

While Paragraph 7 speaks to powers that are coupled with an interest, Appellant overlooks that Paragraph 7 does not define those powers. Instead, the plain language of Paragraph 7 makes clear that it is only those powers that are specifically given to the Bond Company in other sections of the Indemnity Agreement that are deemed to be coupled with an interest. **(R. p. 71)** (describing the power of attorney given to Bond Company as limited to the "rights of [Respondent] assigned to [Bond Company] above."). Naturally, for a power to be coupled with an interest, there must first be a "power." As such, whether the exception provided at § 62-8-103(1) applies is a two-fold inquiry. First, is there power? If so, the second inquiry is whether that power is coupled with an interest in the subject of that power. *See* § 62-8-103(1) (providing an exception for "a [] power to the extent it is coupled with an interest in the subject of the power").

[6] Appellant is neither a party to, nor a third-party beneficiary of the Indemnity Agreement. Thus, it is wholly unclear how Appellant has standing to advance its arguments and/or litigate the scope of the Bond Company's rights under a contract to which Appellant lacks any privity. To this point, Respondent does not concede Appellant's standing to make the instant arguments and asserts the lack of standing as an additional sustaining ground, *infra.*

Here, Appellant puts the cart before the horse, skipping straight to the second inquiry. The flaw in Appellant's reasoning is that it simply assumes, without basis, that the Bond Company had the power to dismiss Respondent's Mechanic's Lien Suit. However, it must be accepted that if the Bond Company did not have the power to dismiss Respondent's Mechanic's Lien Suit, whether that non-existent power is (or could be) coupled with an interest makes no difference.

To this point, it is paramount that the Circuit Court specifically ruled that the Indemnity Agreement **did not** give the Bond Company the power to dismiss the Respondent's Mechanic's Lien Suit, **and Appellant has not appealed this ruling**. **(R. pp. 7-13)**; (App. Br.). Therefore, this Court should affirm because this finding is the law of the case. Moreover, if it is not the law of the case, the Bond Company's purported power to dismiss the mechanic's lien case (if such a power existed) cannot reasonably be considered to be coupled with an interest.

i. Appellant has not appealed the Circuit Court's ruling that the Indemnity Agreement does not give the Bond Company the power to dismiss Respondent's Mechanic's Lien Suit, therefore, this is the law of the case and requires this Court to affirm.

An "unchallenged ruling, right or wrong, is the law of the case" and this "unappealed ruling becomes the law of the case and the appellate court must assume the ruling was correct." *Town of Mount Pleasant v. Jones*, 335 S.C. 295, 299, 516 S.E.2d 468, 470 (Ct. App. 1999).

Here, the Circuit Court considered the Bond Company's purported power to dismiss Respondent's Mechanic's Lien Suit and the Order on Appeal explicitly found: "The power to do so far exceeds the scope of the general indemnity agreement." **(R. p. 10)**.

Appellant has not challenged this ruling. Appellant points to nothing and makes no substantive argument that the Circuit Court was wrong on this point. Instead, it seems Appellant simply assumes the Bond Company had the right to dismiss the Mechanic's Lien Suit and jumps straight to a discussion of why that power was coupled with an interest. *See* (App. Br. pp. 22-24).

Therefore, the Circuit Court's unappealed finding that the Indemnity Agreement did not provide the Bond Company with the power to dismiss the Mechanic's Lien Suit is the law of the case, and this Court must affirm. *See Pcs Nitrogen v. Cont'l Cas. Co.*, 436 S.C. 254, 261, 871 S.E.2d 590, 594 (2022) (recognizing that where the unappealed law of the case supports the trial court's ruling, the appellate court "must affirm"); *see also McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.")[7]

ii. Even if this Court decides not to follow the law of the case, this Court should nonetheless conclude that Bond Company did not have the power to dismiss Respondent's Mechanic's Lien Suit, and even if it did, such a power could not reasonably be considered as coupled with an interest.

Here, the Indemnity Agreement at issue was entered between the Bond Company and Respondent. The purpose of the Indemnity Agreement is to indemnify the Bond Company for "loss" it may incur**. (R. p. 71)**.

To this point the Indemnity Agreement specifically provides a limited "scope" of the rights assigned to the Bond Company. The assignment provided by Respondent under the agreement is "a lien and security interest" in any "action, claim or demand which [Respondent] may acquire against any party to [a] contract." **(R. p. 71)**. However, a lien or security interest is different than ownership. *Accord, Johnson v. Little*, 426 S.C. 423, 429, 827 S.E.2d 207, 211 (Ct. App. 2019)

[7] To the extent that Appellant might claim it appealed the Circuit Court's ruling on this point, Appellant's failure to offer any substantial discussion or cite any evidentiary support or legal authority would suggest the point is abandoned. Thus, leading to the same result—*i.e*., affirming. *See e.g., Bryson v. Bryson,* 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *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 appeal and therefore not presented for review."); *Equivest Fin., LLC v. Ravenel,* 422 S.C. 499, 505-06, 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.") (citation omitted).

(recognizing that a lien or interest in real property provided a "right **that is not an ownership interest**") (emphasis added). Here, the Indemnity Agreement does **not** specifically assign the Bond Company the right to prosecute or dismiss a lawsuit or claim that Respondent may have pending regarding the receipt of payment. Had the Indemnity Agreement intended to assign Appellant the right to control the prosecution and/or dismissal the claims/suits that Respondent has against a third party, this would appear in the plain language of the agreement. But it does not. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 179-80, 790 S.E.2d 919, 924-25 (Ct. App. 2016) ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract.").

For instance, Paragraph 8, Section (b) provides the Bond Company's "Rights" in "Suits". **(R. p. 71)**. This section provides that the Bond Company has the right to "bring separate lawsuits to recover under the [Indemnity] Agreement." **(R. p. 71)**. But where Respondent has filed and is pursuing a suit, there is nothing in the Indemnity Agreement turning the reigns over to the Bond Company. Had the parties intended it, it would have been natural for this section to discuss assignment of the right to dismiss cases that Respondent brought against others, but it does not. **(R. p. 71)**.

This is important because Respondent's ability to pursue claims against third parties offers Respondent with a means to generate the funds needed to indemnify the Bond Company if the need arose. Meanwhile to give the Bond Company the power to dismiss these claims would do the opposite, impairing Respondent's ability to indemnify the Bond Company. This would work to the detriment of both Respondent and the Bond Company. Such an interpretation would be inconsistent with both the general nature of indemnity and the purpose of the Indemnity Agreement.

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Fountain v. Fred'S, Inc.*, 436 S.C. 40, 47, 871 S.E.2d 166, 170 (2022). A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party. *See Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). "Unfortunately, indemnity is sometimes confused with other legal concepts such as suretyship, consequential damages, assignment, or third party beneficiary rights." *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). To the extent Appellant suggest the right to dismiss Respondent's Mechanic's Lien Suit falls within the ambit of "indemnity" Appellant has confused the concept of indemnity with something else altogether.

Naturally, a claim or lawsuit that Respondent may have to recover payment from a third party is akin to an asset—*i.e.*, something of value. As a practical matter, the dismissal of that claim (or destruction of that thing of value) cannot provide the Bond Company with any security. Thus, even if such a power existed, that power could not logically be coupled with an interest for purposes of the UPAA. *See* S.C. Code Ann. § 62-8-103(1) (stating the UPAA applies to all powers except "a [] power to the extent it is coupled with an interest in the subject of the power").[8]

[8] Consider an example in which an "Indemnitor" agreed to indemnify a "Surety" for any loss that Surety incurred to a third-party, and to secure the obligation, Indemnitor also agreed to provide Surety a security interest in a liquid asset valued at $10,000.00. Assume a third-party successfully made a claim against Indemnitor for $10,000.00. Under normal circumstances, Surety would make payment to the third-party then seek indemnity from Indemnitor. If (and only if) Indemnitor refused to indemnify Surety, could Surety take possession of the asset to make itself whole. But now consider a very different scenario in which rather than pay the third-party's claim, Surety took possession of the asset and used the asset to pay the third-party, and then demanded Indemnitor repay Surety the very same $10,000.00 it took from Indemnitor. This is not indemnity. This is theft. And this is what Appellant purports the Bond Company can do here.

Therefore, even if such power did exist under the Indemnity Agreement, because it cannot be coupled with a security interest, the Circuit Court's ruling that the exception to the two-witness requirement does not apply should nonetheless be affirmed.[9]

IV. As an additional sustaining ground, this Court should affirm because even if the Bond Company had the power to dismiss the Mechanic's Lien Suit, the failure of conditions precedent prohibited it from doing so.

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. "Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

Here, Respondent offers this Court two additional sustaining grounds; (A) Appellant does not have standing to assert or litigate what right(s) the Bond Company has under the Indemnity Agreement; and (B) Even if the Bond Company had the power to dismiss the mechanic's lien case (which it did not) the failure of the Bond Company to comply with certain conditions precedent in the Indemnity Agreement made the exercise of that power improper.

A. Because Appellant is not a party to the Indemnity Agreement, it lacks standing to assert its arguments and/or litigate the Bond Company's rights and powers under the Indemnity Agreement.

"Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013). "Standing is . . . that concept of justiciability that is concerned with whether a particular

[9] Of course, this Court need not reach this issue because the fact that the Bond Company did not have the right to dismiss the Mechanic's Lien Suit is the law of the case. *Supra.*

person may raise legal arguments or claims. *Powell v. Bank of Am.*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). A party may not acquire standing by asserting the rights of another. *Id.*

"South Carolina courts have equated privity with standing." *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014). "South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it." *Thomas Trancik, M.D., P.A. v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E.2d 858, 861 (Ct. App. 2003); *see also R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157, 164 (4th Cir. 2004) ("Generally, [under South Carolina law] a third person not in privity of contract with the contracting parties has no right to enforce a contract.").

Here, the entirety of Appellant's arguments depend on, whether the Indemnity Agreement provided the Bond Company the power to dismiss the Mechanic's Lien Suit by unilaterally binding Respondent to the Settlement Agreement over Respondent's objection. However, it is undisputed that Appellant is not a party to the Indemnity Agreement. Accordingly, Appellant does not have standing to assert the purported contractual rights of another—*i.e.*, the Bond Company—arising under a contract in which Appellant has no rights. Particularly where the Bond Company is not even a party to this action. Therefore, this Court should disregard Appellant's arguments for lack of standing and affirm.

B. Even if the Bond Company had the power to dismiss the Mechanic's Lien Suit, the failure of a condition precedent made the exercise of that power improper.

This court has previously concluded that "an action to interpret a power of attorney is similar to an action to interpret a contract" and, thus, "is an action at law." *Rosenberg*, 418 S.C. at 179-80, 790 S.E.2d at 924-25; *citing Watson,* 407 S.C. at 454, 756 S.E.2d at 161. "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in

determining that intention, the court looks to the language of the contract." *Id.* at 180, 790 S.E.2d at 925.

Respondent has previously argued that even if the Bond Company had the power to dismiss the Mechanic's Lien Suit, the failure of conditions precedent to exercising this right precluded the Bond Company from doing so. **(R. p. 183)**. Specifically, Respondent asserted that Paragraph 5, Section II of the Indemnity Agreement requires the Bond Company to notify Respondent (and its personal indemnitors) of a breach of the Indemnity Agreement or bond before it can exercise any right therein. **(R. p. 183)**.

Here, the record is devoid of any evidence that any breach occurred, or that the Bond Company provided any notice of such a breach. Accordingly, even if the Bond Company had the right to dismiss the Mechanic's Lien Suit, (which it did not) it was estopped from doing so because of the failure of these conditions precedent. *See generally, Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207, 214 (2010) (observing that a condition precedent is something that must occur before a party is entitled to enforce a contractual right).

Therefore, for these separate independent sustaining grounds this Court can, and should, affirm.

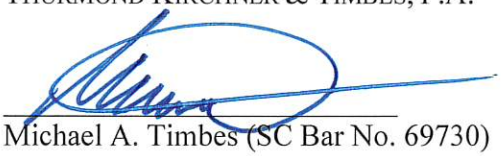
CONCLUSION

For the reasons stated herein, this Court should either dismiss the instant appeal or affirm the order of the Circuit Court.

[signature to follow]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Appellate Case No. 2024-000698

AJP Solutions, LLC Respondent,

v.

Clark Construction, Inc., of Mississippi
TCABC Real Estate Holdings, LLC and
Travelers Casualty and Surety Company
of America, Defendants. Appellant.

Of which Clark Construction, Inc. of Mississippi
is the Appellant.

PROOF OF SERVICE

I, hereby certify that the enclosed was served on the parties stated below by emailing a copy of the enclosed document(s) to opposing counsel:

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March 28, 2025

THURMOND KIRCHNER & TIMBES, P.A.

BY: S/ Kaitlyn Nobles
KAITLYN NOBLES