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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2024-000753

Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC, Appellant,

v.

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation, Defendants,

And

Library Associates, LLC, Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Precision Walls, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, Strong Tower Construction, LLC d/b/a Koch Corporation, Watson Electrical Construction Co., LLC, Trimark Foodcraft, LLC, Pleasant Places, Inc., David Allen Company, Inc., Premier Exteriors, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Low Country Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc., Third-Party Defendants.

Of which Strong Tower Construction, LLC d/b/a Koch Corporation and Watson Electrical Construction Co., LLC are the Respondents.

**APPELLANT'S FINAL REPLY BRIEF
TO STRONG TOWER CONSTRUCTION, LLC'S RESPONDENT'S BRIEF**

James Lynn Werner (SC Bar No. 6029)
Katon Edwards Dawson Jr. (SC Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727- 2650 (Office)
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com

Attorneys for Appellant Balfour Beatty Construction, LLC

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INTRODUCTION

Appellant Balfour Beatty Construction, LLC (“Balfour”) hereby replies to the arguments by Respondent Strong Tower Construction, LLC d/b/a Koch Corporation (“Strong Tower”) in this matter. Strong Tower’s arguments are misplaced and incorrect. For the reasons set forth in Balfour’s Appellant’s Brief, and reiterated here, the Court should issue an order reversing the Master’s September 9, 2021 order granting partial summary judgment and awarding attorneys’ fees to Strong Tower.

ARGUMENTS IN REPLY

- I. The Master erred in granting partial summary judgment in favor of Strong Tower.**
 - A. Strong Tower did not prove its entitlement to summary judgment on its breach of contract claim.**

Strong Tower argues the Master properly granted Strong Tower’s Motion for Partial Summary Judgment. However, Strong Tower moved for summary judgment in the full amount of its claim for \$124,080.21. In ruling on Strong Tower’s motion for summary judgment the Master explicitly recognized that Strong Tower did not prove its entitlement to full summary judgment for all of the relief or damages it had claimed. The Master found that there were amounts claimed by Strong Tower that were in material dispute, with issues remaining for trial. (R. 19, 25). Therefore, in his Order, the Master purported to award Strong Tower only partial summary judgment and only a portion of the relief or damages it sought. Strong Tower’s motion for summary judgment failed because Strong Tower did not submit evidence proving its full claim, or all of its damages with reasonable certainty or accuracy. In view of the Master’s findings, it was error for him to grant any form of summary judgment to Strong Tower.

Summary judgment is inappropriate when a party fails to make a showing sufficient to establish the existence of any element essential to a party’s cause of action. *See Stokes v. Oconee*

Cnty., 441 S.C. 566, 576, 895 S.E.2d 689, 694 (Ct. App. 2023). Damages are an essential element of a cause of action for breach of contract. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). To recover damages pursuant to a breach of contract cause of action, a party must submit evidence that enables the court to determine the amount of damages with reasonable certainty or accuracy. *Collins Ent., Inc. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 269 (Ct. App. 2005).

Strong Tower’s argument that the Master properly granted it partial summary judgment fails to recognize or acknowledge that the Master found that Strong Tower did not prove the amount of damages it claimed in connection with Balfour’s alleged breach of the contract.

In its brief, Strong Tower argues that it supported its motion for summary judgment with (1) “an affidavit of account, stating the sum it was owed on the Project”; (2) Balfour’s responses to interrogatories; and (3) excerpts of deposition testimony. (Strong Tower Brief p. 13). The “evidence” Strong Tower relies upon, however, does not prove its claimed damages with the certainty or accuracy required, and the Master found that there were disputed damages to be determined through trial. The affidavit Strong Tower filed with its mechanic’s lien stated that Strong Tower is owed \$124,080.21 for work it performed on the project.¹ (R. 899). Balfour’s interrogatory responses relied upon by Strong Tower disputed the \$124,080.21 amount claimed and, at most established only that Balfour’s Amended Mechanic’s Lien included \$104,859.21 for amounts associated with Strong Tower’s Subcontract. (R. 916-917). Balfour’s interrogatory

¹ Strong Tower did not submit its Mechanic’s Lien or the associated affidavit to the Master in conjunction with its Motion for Summary Judgment.

responses also stated that “there is currently a \$22,000 pending back charge that would reduce the contractual amount owed to Strong Tower.” (R. 917).

This so-called evidence relied upon by Strong Tower does not prove with adequate certainty or accuracy that Balfour owes Strong Tower \$82,859.21 on its breach of contract cause of action. While during the hearing on its motion for summary judgment, Strong Tower attempted to support an award of the reduced amount of \$82,859.21 by subtracting \$22,000 (a disputed amount) from \$104,859.21 (an amount not otherwise proven to be owed to Strong Tower pursuant to the Subcontract), the Master found that Strong Tower had not established entitlement to the amount claimed in its Motion. In fact, when arguing the Motion for Summary Judgment Strong Tower’s counsel stated “there’s a \$22,000 back charge. I don’t agree with it. I dispute it . . .” (R. 673, 101:18-20). And, Strong Tower put nothing in the Record to prove an actual, undisputed basis for damages of \$82,859.21. Strong Tower presented no invoices, testimony, receipts, or other evidence that would allow the Master to determine \$82,859.21 as the amount of damages beyond conjecture and speculation. *See Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 559–60, 671 S.E.2d 79, 85–86 (Ct. App. 2008) (“Neither the existence, causation nor amount of damages can be left to conjecture, guess, or speculation.”).

Furthermore, in arguing that \$82,859.21 of its claim was “undisputed,” Strong Tower admitted—at least implicitly—that \$41,221 of its total claim was in dispute. The Master agreed because he awarded Strong Tower only the “partial” amount of \$82,859.21 of its claimed damages. Accordingly, it is plain the Master found that Strong Tower’s claimed damages were in dispute as argued by Balfour. Therefore, the Court should reverse the Master’s Order granting (partial) summary judgment in favor of Strong Tower on its breach of contract cause of action.

B. Balfour preserved the arguments raised to this Court regarding the Master’s error in granting partial summary judgment in Strong Tower’s favor.²

Strong Tower argues that Balfour did not adequately preserve the issues for appeal because it did not confront the Master specifically enough with the argument that he could not grant only partial summary judgment. Strong Tower argues that Balfour did not preserve that issue, and cannot address the Master’s error in this appeal, because it did not argue specifically to the Master that the law does not allow partial summary judgment even if the Master believed Strong Tower had established it was entitled to some of the damages it claimed.

At its core, issue preservation merely requires that an issue be raised to and ruled upon by the Master in order for that issue to be available for appeal. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009). In explaining and interpreting the requirements of issue preservation for practical application, the appellate courts of this State have stated the purpose of issue preservation rules is merely to provide the Master with a fair opportunity to rule on the issues, and to provide the Court of Appeals with a platform for meaningful appellate review. *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). It is not necessary that the issue be raised using the same wording, or precisely the same arguments and authorities at each phase of the proceedings. Indeed, the South Carolina Supreme Court has stated that it is “mindful of the need to approach issue preservation rules with a practical eye and not in a ridged, hyper-technical manner.” *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644–45 (2011); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (Toal, C.J., concurring in result

² Strong Tower incorporated Watson’s issue preservation argument into its brief pursuant to Rule 208(b)(6), SCACR. Although Strong Tower makes no substantive independent argument on this issue and Strong Tower’s underlying motion for summary judgment was based on different arguments and evidence than Watson’s motion for partial summary judgment, Balfour will address the argument incorporated by Strong Tower.

and dissenting in part) (“[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice”). As an example of this practical approach, the court in *Herron* specifically concluded that a party is not required to use the exact name of a legal doctrine to preserve an issue for appeal. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

Applying this principle of issue preservation, and the guidance from the prior decisions, the question in this case is whether Balfour sufficiently argued to the Master that he could not grant Strong Tower’s motion for summary judgment because Strong Tower failed to carry its burden to establish that “no genuine issue as to any material fact” relevant to Strong Tower’s claim for breach of contract existed. Not only did Balfour argue that issue to the Master, the Master implicitly acknowledged that genuine issues as to the amount of damages claimed by Strong Tower did exist, and that he could not grant Strong Tower the summary judgment it sought. The issue of whether the Master could award Strong Tower a partial summary judgment never even arose until the Master issued his Order on the motion purporting to do exactly that. When the Master committed such error, Balfour raised that error in its timely Rule 59(e) Motion. Balfour argued that any grant of summary judgment was improper because the record, indeed the Master’s own Order, recognized that genuine issues as to material facts regarding the amount of damages associated with the alleged breach of contract continued to exist. (R. 1236). Thus, Balfour argued that any award of summary judgment was error. Therefore, Balfour did sufficiently argue the relevant point to the Master and it met its burden to preserve the issue for appeal.

In its Memorandum in Opposition to Strong Tower’s Motion for Summary Judgment, Balfour argued that the Master could not grant Strong Tower summary judgment on its breach of contract cause of action or for all the relief or damages sought in that cause of action. (R. 992-

995). During the hearing on the motion, Balfour asserted repeatedly that there were genuine issues of material fact that prevented such a judgment. (R. 677, 105:7-21). For example, Balfour argued that the evidence submitted to the Master regarding the four hundred (400) hours Balfour devoted to resolving water intrusion issues associated with Strong Tower's work demonstrated that defects existed in relation to its work and those defects created a genuine issue of material fact as to Strong Tower's entitlement to recover any amount from Balfour pursuant to the Subcontract. (*Id.*).

In its Motion to Reconsider the Order granting Partial Summary Judgment in favor of Strong Tower, Balfour again raised the issue that genuine issues of material fact existed that prevented summary judgment being awarded to Strong Tower. Balfour argued that Strong Tower's entitlement to all of the amounts claimed as damages was still a factual issue that could not be fully resolved. (R. 1236).

In this appeal, Balfour, as is proper for it to do, again asserts, that the Master erred in granting any summary judgment in favor of Strong Tower. The foundational position on which Balfour has opposed the motion for summary judgment remains consistent; a genuine issue of material fact exists as to whether Strong Tower is entitled to recover the full relief sought and the damages claimed pursuant to its breach of contract cause of action. Balfour's Brief merely supports its position by pointing out that the Master himself specifically acknowledged he could not grant Strong Tower summary judgment (or full relief) on its whole breach of contract claim, and that Rule 56, SCRPC, does not authorize partial summary judgment as set forth in the Master's Order.

An illustration of the point that an issue is preserved for appeal when it is raised more broadly below but brought into focus in considerably more detail in the appellate argument exists in the decision in *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In that case,

the South Carolina Supreme Court addressed a circumstance in which the plaintiff made only a general objection at trial to the defendant's evidence (admission of an amortization schedule as proof). On appeal, the plaintiff raised and argued more detailed and specific points regarding the use of the amortization schedule, as admissible and sufficient evidence. *Wilder*, 330 S.C. at 75, 497 S.E.2d at 733. And, the defendant argued in the appeal that the plaintiff's objection to the amortization schedule during trial was too general to preserve the various more specific objections or issues for appeal. *Id.* Nonetheless, the Court held that the plaintiff's objection was sufficiently specific to bring into focus the nature of the alleged error so that it could be understood by the trial court. *Id.*; *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the appeal, the objection was sufficiently specific to allow the trial court to rule on the issue). Thus, the Court found the issue and arguments were preserved.

Like the plaintiff in *Wilder*, Balfour raised to the Master the overarching issue that Strong Tower was not entitled to the summary judgment for which it moved because there were genuine issues as to material facts that prevented an award of the full or complete relief and damages sought in the motion for summary judgment. In this appeal, Balfour continues to press the issue and argument presented to the Master. Now Balfour permissibly and properly reinforces its opposition to the award of summary judgment by arguing that the Master's decision to grant "partial" summary judgment was reversible error under Rule 56(d). In the order granting Strong Tower partial summary judgment, the Master implicitly recognized that a genuine issue of material fact existed as to Strong Tower's claimed damages by stating his conclusion as "[t]here exists no genuine issues of material fact as to *at least* \$82,859.21 owed by [Balfour] to [Strong Tower] under the parties' contract," (R. 17), while expressly recognizing that Strong Tower's claim for breach

of contract could not be and was not fully resolved by summary judgment. Indeed, recognizing that Strong Tower's claim still had issues for trial, the Master stated that Strong Tower could present its case first during the trial of the case. (R. 683, 111:1-23). In response, Strong Tower acknowledged that at least the \$22,000 back charge was still in dispute. (R. 683-684, 111:24-112:1). These acknowledgments by Strong Tower and the Master demonstrate that a genuine issue of material fact exists as to the amount of damages at issue in Strong Tower's breach of contract cause of action. The Master's decision to grant only *partial* summary judgment exemplifies the fact that summary judgment was inappropriate due to the existence of a genuine issue of material fact and the inability to render judgment as to the whole claim. As recognized by the Court in *Wilder*, Balfour is permitted in this appeal to provide further detail and further support for its preserved opposition to the award of summary judgment. Accordingly, the issue is preserved for review on appeal.

C. The Master erred in awarding “partial” summary judgment, judgment on only a portion of Strong Tower’s breach of contract cause of action.³

Strong Tower asserts that Rule 56, SCRCF, permits the Master to award “partial” summary judgment (in other words, judgment on only a portion of its cause of action for breach of contract).

Strong Tower is patently incorrect.

Rule 56(a), SCRCF, states:

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

³ Pursuant to Rule 208(b)(6), SCACR, Strong Tower incorporated Watson's argument regarding the propriety of granting partial summary judgment pursuant to Rule 56, SCRCF into its brief. Although Strong Tower makes no independent argument on this issue, Balfour will address the argument incorporated by Strong Tower.

However, Rule 56(d), SCRCF, applies when the court is unable to render judgment “upon the whole case or for all the relief asked.” When the court is unable to award all of the relief requested in a motion for summary judgment (when a court is unable to fully adjudicate a cause of action at issue in a motion for summary judgment), then the court cannot enter judgment, but may only ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. *See* Rule 56(d), SCRCF. In such circumstance, the court may enter an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy. Beyond that, the Master may only direct such further proceedings in the action as are just, such as the trial of the action, treating the facts so specified in the interim order as being deemed established for future proceedings. *See id.* Judgment on the partial determination is neither authorized, nor proper.

When Rule 56(a) and Rule 56(d) are read together, the proper application of Rule 56 in a case such as this becomes clear. Under Rule 56(a) a party may move for summary judgment on one or more of its causes of action; however, if the court is unable to fully adjudicate the cause of action at issue, or grant the full relief sought in the motion, then under Rule 56(d), the court may only issue an order specifying the facts that appear without substantial controversy. Rule 56 does not authorize entry of judgment, let alone on only a portion of the claim upon which the summary judgment motion was presented. Contrary to Strong Tower’s arguments, the proper application of Rule 56, giving effect to both subparts (a) and (d), does not render “meaningless” subpart (a).

The court in *Arado v. Gen. Fire Extinguisher Corp.*, 626 F. Supp. 506, 508–09 (N.D. Ill. 1985) addressed this precise issue.⁴ In *Arado*, the court stated that “Rule[] 56(a) . . . simply do[es] not permit the piecemealing of a single claim or the type of issue-narrowing sought by [the moving party]” and “Rule 56(a)’s reference to ‘all or any part’ of a claim . . . authorizes only the granting of appealable ‘judgments’ disposing of entire claims.” *Arado*, 626 F. Supp. at 508–09 (quoting *Capitol Records, Inc. v. Progress Record Distributing, Inc.*, 106 F.R.D. 25 (N.D. Ill. 1985)). In the present case, Strong Tower’s entire claim for breach of contract involved more issues, more damages and more requested relief than resolved or disposed of in the Master’s summary judgment order.

The court in *Arkansas-Best Freight Sys., Inc. v. Youngblood*, 61 F.R.D. 565, 570–71 (W.D. Ark. 1974) addressed a similar application of Rule 56. In *Youngblood*, the plaintiff filed a complaint seeking \$410,363.11 in total damages; however, in its motion for partial summary judgment the plaintiff sought to recover a sum of \$200,000.00, leaving the remainder of the claim and complaint for damages for further adjudication. The court, quoting Volume 10, Wright & Miller, Federal Practice and Procedure: Civil § 2737, stated:

According to Rule 56(d), if a court finds that summary judgment cannot be granted because there are genuine issues of material fact to be tried, it is empowered, when it would be practicable to save time and expense and to simplify the trial, to issue an order that specifies the facts that appear without substantial controversy. . . . Rule 56(d) does not authorize the entry of a judgment on part of a claim or the granting of partial relief. It simply empowers the court to withdraw sham issues from the case and to specify those facts that really cannot be controverted. As one court has noted, the primary purpose of the rule is to ‘salvage some results from the judicial effort involved in the denial of a motion for summary judgment.’

⁴ Prior to December 1, 2007, Rule 56(d) of the Federal Rules of Civil Procedure was identical to Rule 56(d) of the South Carolina Rule of Civil Procedure. Given this history, it is clear that reference to Federal Court decisions under Federal Rule 56(d) remain applicable to cases involving Rule 56(d), SCRCF.

Inasmuch as it narrows the scope of the trial, an order under Rule 56(d) has been compared to a pretrial order under Rule 16.

Based on this application of Rule 56(d), the court in *Youngblood* denied the plaintiff's motion for summary judgment on only the portion of its claim because "[i]n countless opinions federal courts have expressed a disapproval of piecemeal litigation." *Id.* at 572. The court concluded its reasoning by discussing the application of this principle based upon a claim for services such as was present in *Biggins v. Oltmer Iron Works*, 154 F.2d 214, 215 (7th Cir. 1946). The court stated that:

Let us assume that in a claim for services such as was present in the *Biggins* case, it was first ascertained that two items were not in dispute, and then, a bit later, it was determined that liability on a third item, and still later, on a fourth item, was established. If the construction of the rule by [plaintiffs] in the case at bar is correct, there might well have been three summary judgments in the supposititious case with executions levied upon each of them. Such fragmentations of a cause of action would be obnoxious to the orderly administration of justice.'

Id.

In the Appellant's Brief, Balfour cited the decision in *Chambers v. Pingree*, 334 S.C. 349, 354–55, 513 S.E.2d 369, 372 (Ct. App. 1999), as support for the proposition that a partial summary judgment such as the Master purported to award to Strong Tower was improper. Strong Tower now attempts to argue that *Chambers* is distinguishable or otherwise limited to a unique set of facts. Strong Tower's argument is incorrect and it fails. In *Chambers*, the Court analyzed whether it was proper for the circuit court to grant partial summary judgment on a defendant's counterclaim to recover amounts due under a promissory note while simultaneously acknowledging that the issue of the total amount of damages to which defendant was entitled on its claim remained in dispute and required a subsequent damages hearing. The Court of Appeals found that "a party cannot establish the right to recover on a promissory note yet need a damages hearing to ascertain

if any amount is due . . . In these circumstances, partial summary judgment is simply illogical.” *Id.* at 354-55, 513 S.E.2d at 372. The Court explained its conclusion that such partial summary judgment is improper when it stated that “the circuit court’s order implicitly acknowledge[d] that a question of fact exists regarding damages; otherwise, the court would not have noted the need for a damages hearing.” *Id.* at 355, 513 S.E.2d at 373. The Court also stated that granting partial summary judgment in this fashion “is antithetic to our concept of summary judgment” because the facts will be re-litigated at a subsequent trial on the remainder of the claim. *Id.* 334 S.C. at 356, 513 S.E.2d at 373.

In its Brief, Strong Tower argues that the Court’s opinion in *Chambers* is not applicable to this appeal because the Court in *Chambers* stated that “[i]n these circumstances, partial summary judgment is simply illogical.” Nothing in *Chambers* limits the application of that case to any unique set of facts. The “circumstance” at issue in *Chambers* is directly analogous to the issues before the Court presently. In this case, the Master concluded that Balfour breached the Subcontract by failing to pay Strong Tower, but acknowledged that a genuine issue of material fact existed as to the extent, or impact, or consequences of the breach and the amounts owed to Strong Tower by Balfour as a result thereof (recognizing there was evidence of at least the \$22,000 back charge). Thus, the Master acknowledged explicitly that further proceedings were required to resolve completely Strong Tower’s breach of contract cause of action and the amount of damages. This is the same illogical result of a summary judgment motion that the Court in *Chambers* held to be improper and reversible.

Strong Tower also relies upon the court’s opinion in *Bank of America v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) to support its incorrect argument that Rule 56, SCRPC, permits a court to award partial summary judgment on a portion of a cause of action. The court’s

opinion in *Draper* contains no analysis of the propriety of awarding “partial” summary judgment on a portion of a cause of action. Rather, the court in *Draper* merely reversed the master’s summary judgment award because a genuine issue of material fact existed as a result of conflicting affidavits that were submitted by the parties. The court offered no opinion and conducted no analysis of whether the master in that case was authorized to award partial summary judgment on a portion of a claim. As such, Strong Tower’s reliance on *Draper* is misplaced.

Furthermore, the cases from federal jurisdictions cited by Strong Tower do not support the proposition that partial summary judgment on a portion of a single claim is appropriate. *See, e.g., Capps v. Long*, No. 20-6789, 2021 WL 4843568, *1 - *2 (4th Circuit, October 18, 2021) (affirming a grant of summary judgment on a plaintiff’s Fourth Amendment claim against two of the three defendants—not awarding partial relief on a portion of a single claim); *Gadsen v. Fripp*, 330 F.2d 545, 547 (4th Cir. 1964) (reversing the trial court’s grant of summary judgment on both of the plaintiff’s alleged claims because the plaintiff’s claim for continuing trespass was not addressed during the summary judgment proceedings and, therefore, it was improperly dismissed by the trial court’s order granting judgment on the plaintiff’s other claim).

II. Strong Tower’s purported later dismissal of the remainder of its causes of action does not permit it to avoid this Court’s correction of the Master’s error in granting partial summary judgment in favor of Strong Tower on its breach of contract cause of action.

The error in the Master’s order granting the partial summary judgment is not cured or rendered moot by Strong Tower’s subsequent attempt to dismiss or abandon other portions of its breach of contract cause of action. The Master issued his order granting Strong Tower partial summary judgment on September 9, 2021. On September 15, 2021, Strong Tower moved pursuant to Rule 41, SCRCF, to dismiss the remainder of its claims against Balfour, including its “quantum meruit claim against [Balfour] and its breach of contract claim against [Balfour], for damages above the judgment amount in the summary judgment order.” (R. 1229). Clearly, none of these

circumstances existed at the time of the Master's Order. Thus, they did not impact the Order when it was issued. Moreover, the remainder of Strong Tower's claims never were dismissed. No Order of Dismissal was ever entered. Instead, the Master merely entered an order on April 4, 2024, denying Balfour's Motion to Reconsider and certifying Strong Tower's judgment as final pursuant to Rule 54(b), SCRCF.

Strong Tower now argues that its attempt to dismiss the remainder of its breach of contract cause of action against Balfour cures the errors of the prior improper grant of partial summary judgment. Strong Tower's argument is without merit.

Prior to Strong Tower's attempt to dismiss its remaining causes of action, the Master erred in granting partial summary judgment in Strong Tower's favor. When Strong Tower moved to dismiss the remainder of its causes of action, the Master had already committed a reversible error—granting summary judgment on a portion of a cause of action while acknowledging that the existence of genuine issues of material fact prevented him from granting judgment on the entire claim. Strong Tower's subsequent independent motion to dismiss its remaining claims, after it had benefited from and accepted the benefit of the Master improperly granting it partial summary judgment, cannot serve as a basis for Strong Tower to avoid this Court's correction of the errors that had already been committed by the Master.

Indeed, Strong Tower moved on September 15, 2021, to dismiss its remaining claims pursuant to Rule 41, SCRCF. Rule 41(a) and Rule 41(b) each provide that a dismissal of a claim under those rules is without prejudice unless it is specifically stated to be with prejudice. In its Motion, Strong Tower did not state that the requested dismissal was with prejudice and, therefore, Strong Tower's motion to dismiss its remaining claims was a request to dismiss the remaining

claims only without prejudice. Furthermore, no order was ever entered dismissing Strong Tower's claims in any way.

A party is not permitted to dismiss portions of a cause of action to manipulate appellate proceedings and avoid an appellate court's review and correction of errors already committed by the lower court. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 37–38 (2017) (holding the plaintiff could not voluntarily dismiss his claims without prejudice to manipulate appellate proceedings); *Kiviti v. Bhatt*, 80 F.4th 520, 530 (4th Cir. 2023), *cert. denied*, 144 S.Ct. 2519 (2024). Nevertheless, that is what Strong Tower has attempted to do in this case. After obtaining an erroneous order granting “partial” summary judgment in its favor, Strong Tower attempted only to dismiss the remaining portion of its claims (without prejudice).

Strong Tower should not be permitted to take advantage of the Master's error and avoid this Court's review of those errors based on a manipulation of its claims after the Master had already erred. Strong Tower cannot manufacture finality on its unresolved breach of contract claim. Accordingly, the Court should reject Strong Tower's argument that its after-the-fact attempt to voluntarily dismiss the remainder of its cause of action for breach of contract bars this Court from correcting the Master's errors on appeal.

III. The Master erred in awarding Strong Tower attorney's fees pursuant to Article 10 of the Subcontract.

In response to Balfour's arguments regarding the Master's error in awarding Strong Tower attorneys' fees pursuant to Article 10 of the Subcontract, Strong Tower relies on Rule 208(b), SCACR and incorporates by reference Watson's arguments concerning this issue, while also raising its own argument regarding this issue.

A. Balfour preserved its arguments regarding the Master's errors in awarding Strong Tower attorneys' fees.

Strong Tower now asserts that Balfour's arguments regarding the Master's error in awarding attorneys' fees to Strong Tower is not preserved. It argues this position because it says Balfour raised that argument for the first time in its Motion to Reconsider. Strong Tower's characterization of the proceedings below and its assertion about the issue of preservation is incorrect.

Strong Tower's Motion for Summary Judgment, which was the genesis of this entire appeal, made no substantive argument and presented no evidence in support of any entitlement to attorneys' fees. In fact, Strong Tower's only reference to attorneys' fees in the motion is a single sentence which states: "[Strong Tower] is further entitled to attorney's fees and costs from [Balfour] under Section 10(D) of the parties' contract." (R. 1067).

After Balfour argued in opposition to the grant of summary judgment in favor of Strong Tower, and after the Master announced that he would award Strong Tower relief, Strong Tower's counsel stated "I have a fees provision in my contract as well" and offered to submit an affidavit. (R. 682, 110:7-17). On September 3, 2021, Strong Tower filed an Affidavit of Attorneys' Fees and Costs and a proposed order granting its Motion for Summary Judgment. Six (6) days later, on September 9, 2021, without further hearing the Master entered his Order granting partial summary judgment in favor of Strong Tower and awarding Strong Tower attorneys' fees.

After the Master issued his Order granting partial summary judgment in favor of Strong Tower, and including an award of attorneys' fees to Strong Tower, Balfour filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCPP. Balfour asserted and argued in that Rule 59(e) motion that Strong Tower is not entitled to attorney's fees pursuant to Article 10.D of the Subcontract. (R. 1233-1236). Balfour specifically asserted that because the dispute between Strong Tower and

Balfour involves the conduct of Library, and Article 10.D only applies to claims between Strong Tower and Balfour that (1) do not involve the conduct of Library and (2) were not compelled to arbitration pursuant to Article 10.A's arbitration provision, the award of attorney's fees was error. (*Id.*). As this was Balfour's first opportunity to respond to Strong Tower's arguments and the Master's award of attorneys' fees pursuant to Article 10.D of the Subcontract, Balfour properly preserved the arguments raised in its Appellant's Brief regarding the error of any award of attorneys' fees to Strong Tower in this case. *See In re Timmerman*, 331 S.C. 455, 460–61, 502 S.E.2d 920, 922 (Ct. App. 1998) (stating that when a party receives an order that grants certain relief not previously contemplated or presented to the trial court the party may preserve an issue for appeal by filing a motion pursuant to Rule 59(e), SCRPC). Therefore, Balfour properly raised its arguments in opposition to Strong Tower's request and the Master's award of attorneys' fees pursuant to Article 10 of the Subcontract in its Motion to Reconsider. Accordingly, Balfour preserved the arguments raised in its Appellant's Brief regarding the Master's erroneous award of attorney's fees to Strong Tower.

B. The Court reviews the Master's award of attorneys' fees based on an abuse of discretion—not whether a genuine issue of material fact exists in relation to the award of attorneys' fees.

Strong Tower incorrectly argues that Balfour was required to present evidence to the Master that its claim involved the conduct of the Owner. However, Strong Tower misconstrues the circumstances and the law, and incorrectly attempts to create factual and evidentiary issues having no relevance to the issue of whether the Subcontract permitted the Master to award attorneys' fees pursuant to the Subcontract.

The proper standard of review of an award of attorneys' fees is an abuse of discretion. *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009). An abuse of discretion occurs when the Master's decision is based on an error of law.

Id. (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997)). The interpretation of an unambiguous contract is a question of law. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Thus, the Master’s interpretation of the Subcontract and analysis of Article 10 of the Subcontract, is reviewed for an abuse of discretion and the summary judgment standard of review is not applicable to this issue. Accordingly, Strong Tower’s arguments regarding whether Balfour presented evidence to create a genuine issue of material fact regarding the award of attorneys’ fees are without merit.

C. Strong Tower argues incorrectly that the Court is to determine whether its claims involve the conduct of the Owner when the Court considered Strong Tower’s request for attorney’s fees and not at the proper time—the pleadings stage.

In its arguments regarding the application of Article 10 of the Subcontract, Strong Tower attempts to mischaracterize the purpose of the contract provision and to apply it only at the time when the request for the award of attorneys’ fees is made. That focal point is incorrect. Article 10 requires a threshold determination made at the time the claim is asserted or commenced. The issue is whether the claim in controversy is subject to arbitration, because if it is subject to arbitration there is no entitlement to attorneys’ fees. That determination must be made at the inception (not at the conclusion). *See In re Little*, 610 B.R. 558, 565 (Bankr. D.S.C. 2020) (stating that for each of the plaintiff’s causes of action, the Court must first determine if the claim is subject to arbitration before addressing any issue on the merits of the claim). If the claim is subject to arbitration at Balfour’s choice because it does not involve the conduct of Library, there is no basis for a request or award of attorneys’ fees.

Based upon its mischaracterization of the issue, Strong Tower tries to argue that Balfour had a specific duty to introduce evidence addressing Library’s conduct during the hearing on the Motion for Summary Judgment. However, Strong Tower’s arguments fail because it is axiomatic

that the issue of whether the dispute between Strong Tower and Balfour involves the conduct of Library is a threshold determination to be made at the commencement of the dispute. Thus, the assessment of whether the dispute involves Library's conduct must be framed by the pleadings and the allegations at commencement. *See In re Little*, 610 B.R. at 565.

As stated in Balfour's Appellant's Brief, the pleadings demonstrate plainly that the dispute between Balfour and Strong Tower involves Library's conduct. Relevant allegations by Strong Tower evidencing the involvement of Library's (the Owner's) conduct in the dispute between Strong Tower and Balfour include:

1. "Library, is retaining sums currently due and owing the Defendant, Balfour." (R. 311).
2. "[T]hese sums were generated partially through the use of [Strong Tower's] materials on the project." (R. 311).
3. "Library[] is currently holding the sums in a constructive trust for the benefit of [Strong Tower] who furnished goods and materials necessary to complete the project and generate these funds." (R. 311).
4. "Library[] should be ordered to pay [Strong Tower] enough of said funds to satisfy its indebtedness." (R. 311).
5. "Library and Balfour, have had the use of these materials, have been enriched by the provision of services and materials, and are unjustly retaining the benefit of these services and materials without paying [Strong Tower]." (R. 310).
6. "Library and Balfour, are liable to [Strong Tower] for the reasonable value of materials, One Hundred Twenty-Four Thousand Eighty and 21/100 (\$124,080.21) Dollars, plus prejudgment interest at 8.75% per annum from the date said materials and service were supplied." (R. 310).

On their face, Strong Tower's own allegations demonstrate from the inception that the dispute in issue in its claims involves Library's conduct. Accordingly, Strong Tower's dispute with Balfour is not a dispute for which Strong Tower is entitled to recover attorneys' fees pursuant to

Article 10.D of the Subcontract because Strong Tower’s breach of contract claim involves Library’s conduct and, therefore, is subject to Article 10.B’s dispute resolution provision—which does not provide for an award of attorneys’ fees to the prevailing party. The Master erred in awarding such attorneys’ fees that were not authorized by Article 10.D under the circumstances of Strong Tower’s claim.

IV. Strong Tower identifies no basis for affirming the Master based on other grounds found in the Record.

As a final catch-all argument, Strong Tower requests the Court affirm the Master pursuant to Rule 220(c), SCACR, based upon any ground(s) appearing in the Record on Appeal. However, Strong Tower does not identify any additional sustaining ground or any matter in the Record that would support affirming the Master.

A respondent abandon’s an additional sustaining ground by failing to raise it in its Respondent’s Brief. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). The Court is not required to search the Record and craft arguments that are not raised by a respondent. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (explaining that “[j]udges are not like pigs, hunting for truffles buried in [the record]”); *Cranfill v. SC Home Builders Self Insurers Fund*, No. 6:22-CV-2677-JDA-KFM, 2025 WL 449319, at *9 (D.S.C. Jan. 24, 2025), *report and recommendation adopted*, No. 6:22-CV-02677-JDA, 2025 WL 447891 (D.S.C. Feb. 10, 2025) (“[I]t is not the obligation of this court to research and construct legal arguments open to parties, especially when they are represented by counsel,” and “perfunctory and undeveloped arguments ... are waived.”) (citation omitted)).

Accordingly, Strong Tower’s attempt to include a final catch-all argument based on the application of Rule 220(c), SCACR, is without merit and should be deemed abandoned due to Strong Tower’s failure to identify any additional sustaining ground in its Respondent’s Brief.

CONCLUSION

Based on the foregoing, the Master's Orders granting summary judgment and awarding attorneys' fees in favor of Strong Tower should be reversed.

PARKER POE ADAMS & BERNSTEIN LLP

s/James Lynn Werner

James Lynn Werner (SC Bar No. 6029)
Katon Edwards Dawson Jr. (SC Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727- 2650 (Office)
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com

*Attorneys for Appellant Balfour Beatty Construction,
LLC*

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Columbia, South Carolina