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. 2024-000788
Case No.: 2019-CP-10-01108

Balfour Beatty Construction, LLC, Appellant,

v.

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

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 Library Associates, LLC is the Respondent.

APPELLANT'S INITIAL REPLY BRIEF

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INTRODUCTION

Library's Respondent's Brief is essentially no response at all to the specific issues, assignments of error, and arguments presented by Balfour in this appeal. Balfour asserted no less than sixteen (16) assignments of error by the Master in its Brief supporting this appeal. With respect to each assignment of error, Balfour cited and discussed specific facts from the Record (both testimony and exhibits) and cited specific legal authority supporting each assignment of error. In its Respondent's Brief, Library utterly failed to address in any way at least thirteen (13) of those assignments of error. It provided no factual or legal response or opposition to the appellate issues specifically raised and addressed by Balfour.

As previously stated by this Court, the failure of a party to respond to an appeal issue and argument raised by the other party in its brief may be deemed a concession that the other party's argument is correct. *See First Union Nat. Bank of S.C. v. FCVS Commc'ns*, 321 S.C. 496, 502, 468 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part*, 328 S.C. 290, 494 S.E.2d 429 (1997) (citing 5 Am. Jur. 2d *Appellate Review* § 555, at 254 (1995) ("[i]f an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct"); *see also Turner v. S.C. Dept. of Health & Env't Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008).

While the authority does not mandate that the Court treat the failure to respond as a confession or concession that the other party's position is correct, it clearly authorizes such a finding and conclusion. In this case, as shown in the Appellant's Brief and hereinafter, this Court should draw such a conclusion because of Library's pervasive decision not to respond to or address the various specific issues and arguments in Balfour's appeal. Like Library's "scatter-gun" approach to the Designation of Matter to be included in the Record by over-designating essentially the entire record from below, without specific reference to material and relevant portions, the

failure to respond to and address the majority of the specific issues in this appeal portends Library's approach that it expects this Court to do Library's job for it, and to spend the Court's time and resources searching for facts in the Record and legal authorities to justify the Master's and Library's erroneous positions. Further evidence of Library's inadequate response is its bare argument that this Court should affirm the Master "based on any evidence in the Record." This improper attempt to have this Court do the work to identify an additional sustaining ground for the Master's decisions is unavailing and improper.

While the Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal," it is not for the Court to identify such ground(s) or to scour the record below and to do the legal analysis to justify such ground(s). In *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000), the South Carolina Supreme Court held: "[A] respondent may abandon an additional sustaining ground … by failing to raise it in the appellate brief." In this case, Library neither raised, nor identified any additional sustaining ground applicable and the Court should deem Library to have abandoned such additional arguments and grounds.

I. The Master's findings reflect errors of law that are not supported by the evidence in the Record and reflect and abuse of discretion.

To justify his findings and conclusions, the Master ignored direct evidence and inconsistent testimony of Library's witnesses. Thus, he adopted patently unreliable conclusions.

A master commits an error of law when the master is vested with discretion but his ruling reveals no discretion was in fact exercised. *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004) (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990)). "A failure to exercise discretion amounts to an abuse of that discretion." *Id.* (citing *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). Moreover, a master commits an error of law when there is no evidence in the record to

reasonably support the master's findings. *Gibson v. Ameris Bank*, 420 S.C. 536, 541–42, 804 S.E.2d 276, 279 (Ct. App. 2017).

In this case, the Master committed an error of law and abused his discretion by ignoring witness testimony and the plain language of the Contract Documents. Perhaps some of the best examples of the abuse of discretion and erroneous findings by the Master are:

1. The Master incorrectly found that Hadley was required to rely on anecdotal evidence to conduct the audit.

In the October 6 Order, the Master stated that "[a]s a direct and proximate result of Contractor's refusal to produce documents, data or accountings, Hadley was forced to rely on anecdotal information available to the Owner." Library reiterated this false statement in its Respondent's Brief. (Resp. Br. p. 7). In truth, Hadley was not "forced to rely on anecdotal information available to [Library]." Hadley's Report—which was admitted into evidence at trial—plainly admits that she had a copy of Balfour's Job Cost Report and the Applications for Payment prior to preparing her December 10, 2020 audit report. (Balfour Ex. 350). In fact, the Contract Documents required Balfour to summarize its cost records in a computer printout and submit that job cost summary with each Application for Payment. (Balfour Ex. 56, § 7.1.4). Since, the Record plainly reflects that the Architect received and approved each of Balfour's Applications for Payment through Number 43, and certified each Application for Payment, it is evidence that Library received Balfour's job cost reports for the duration of the Project. Thus, Library possessed the cumulative job cost information and reports and had them available to provide it to its auditor, Ms. Hadley. Any assertion to the contrary is contradicted by the unequivocal Record in the case. *See*, *e.g.*, (Library Ex. 143; 142; 141; 140; 139).

2. Hadley's impermissible testimony and opinions regarding RCOs and Claims.

Hadley's December 10, 2020 GMP Contract Evaluation report, (Balfour Ex. 350), specifically admitted that her analysis should not reflect her opinions regarding legal entitlement to claim amounts because those determinations of entitlement are the sole responsibility of the trier of fact. She admitted that such determinations were not properly part of her audit and a final audit could not be completed until after change order and claim determinations had been finalized properly under the Contract. Hadley also testified that the Master was going to have to decide whether and in what amount Balfour or Library were entitled to recover pursuant to the RCOs and claims. (Tr. 4163:14–24). Despite these admissions by Hadley about the proper limitations of her role as an auditor, the Master erroneously instructed Hadley to evaluate the "Claims" and to opine on final GMP and project costs. (Tr. 3939:21–3940:11). Over Balfour's objection, (Tr. 3925:15–20), the Master permitted (in fact instructed) Hadley improperly to testify as to her opinions regarding the RCOs and Balfour's Claims purportedly as part of her audit function. The admission of Hadley's opinions and testimony on these matters was improper and the Master's reliance on it was error. *See State v. Ellis*, 345 S.C. 175, 177–78, 547 S.E.2d 490, 491 (2001) (holding the trial court erred in admitting testimony from an expert that was outside the area he was qualified to testify).

3. The Master incorrectly found that Balfour's "failure to submit a final pay application . . . supports the Court's conclusion" that Balfour's claims are unreliable.

Library and the Master each also stated that "Contractor NEVER submitted a final payment request, or the documentation required pursuant to Section 7.2.1 of the AIA 133." (Resp. Br. p. 12); (Oct. 6. Order p. 14, 36). The "failure" to submit a final payment request is immaterial to Balfour's claims and is simply a red-herring.

In this case, a final Application for Payment could not be prepared or presented until the disputes regarding Library's failure to make progress payments due and Library's failure to process Change Orders and other "Claims" and "Disputes" were resolved. *See* (Tr. 4340:11–4341:6). This litigation was commenced to determine and resolve those issues. Therefore, the Master's finding that Balfour never submitted a final payment request is irrelevant to the legitimacy of Balfour's claims and further reflects the Master's failure to interpret the Contract Documents properly.

4. Library and the Master misinterpreted Balfour's obligations in relation to the performance of a final accounting or an audit for the Project.

In the Respondent's Brief, Library incorrectly states that "[t]he uncontradicted testimony was [Balfour] did not provide a final accounting or an audit for the Project—notwithstanding that the mandatory, fundamental, and unambiguous requirements of the Contract Documents required it to do so." (Resp. Br. p. 6). The Contract Documents (§7.2.1) state that the "final accounting is a complete and full accounting of costs incurred by [Balfour] in performance of the Work." (Balfour Ex. 56). Thus, a final accounting could not have been accomplished until the final scope of work under the Contract Documents is determined based on resolution of the entitlement to the RCOs, as well as the claims for delays and related damages. Library's own expert (Hadley) supported this conclusion when she testified that a final accounting would not have been necessary until the subcontractors had been paid. (Tr. 3929:9–18).

Similarly, Library and the Master misconstrue Balfour's obligations in relation to the performance of an audit for the Project. Under the Contract, Balfour kept records and accounts of the Cost of the Work, (Balfour Ex. 56, § 6.11.1), and the Contract provided Library the right to perform periodic examinations, audits, and verifications of Balfour's cost accounting records and the costs incurred in performing the Work. (*Id*. at § 7.1.11). Balfour was obligated only to make its records available to Library for such examination after receiving reasonable advance notice

from Library. (*Id.*). Balfour had no contractual obligation to audit, or to obtain an audit by a third-party, relating to the cost records or the actual costs. In fact, no request for an audit was ever made by Library—and none has been identified by Library in the Record—until after the lawsuit was filed by Balfour in March 2019. (Tr. 3923:4–11). As stated by Library, Hadley made a request for access to cost records in April 2019 (one month after the lawsuit had been filed). Therefore, the Master's conclusions and Library's false contentions regarding Balfour's obligation to perform an audit for the Project are not supported by the evidence in the Record.

II. Evidence, including testimony of Library's witnesses plainly established that Balfour was entitled to additional payments.

A. Library's failure to pay certified Applications for Payment is a breach of the Contract.

In the Respondent's Brief, Library argues incorrectly that the Master did not err in finding Balfour was not entitled to any further payment from Library pursuant to the Contract Documents. Specifically, Library baldly states that it did not breach the Contract and "no breach was shown." Library is incorrect and, contrary to Library's conclusory statements, the record in this case demonstrates plainly that Library breached the Contract by failing to make progress payments when due and Balfour is entitled to recover additional payments for the work it performed.

Article 7 of the Contract states that Library shall make progress payments to Balfour within thirty (30) days of the date the Architect certifies the pay application. (Balfour Ex. 56). Balfour submitted Application for Payment No. 43 on October 26, 2018. (Library Ex. 141). On November 1, 2018, Guy M. Beatty Construction, LLC (a subcontractor for Bernhard MCC, LLC on the Project) filed a Notice of Mechanic's Lien in the amount of $110,195.85 for work performed on the Project. (Library Ex. 40), but nonetheless on November 8, 2018, the Architect (Jennifer Faulkinberry) certified Application 43 for payment in the amount of $556,408.01. (Library Ex. 141). There is no dispute that, as of the submission of Application for Payment No. 43, the then

existing GMP was $64,924,641.87, but Balfour had only been paid $59,994,390.00 for prior applications. (*Id*.). Application for Payment No. 43 expressly certified that Library was to pay Balfour $556,408.01 for the work it had performed, and the Contract Documents required Library to make payment of the certified amount not later than the thirteenth day of the following month. (Balfour Ex. 56, §7.1.3). Therefore, payment to Balfour for the work performed pursuant to Application for Payment No. 43 was due to Balfour no later than November 13, 2018. It is uncontroverted that Library did not make *any* payments to Balfour after it submitted Application No. 43. Furthermore, contrary to incorrect and unsupported statements by Library and its witnesses, the certification for payment on Application 43 was never "decertified." The General Conditions of the Contract, §9.5, deals with the issue of certifying, or deciding to withhold certification of progress payments due to Balfour. (Balfour Ex. 56). Library's Architect did not comply with §9.5 in withholding the entire amount certified for payment to Balfour on Application 43. Thus, in failing and refusing to make any payment to Balfour on Application 43, Library breached the Contract. At most Library may have been entitled to withhold paying Balfour $110,195.85 of the total amount certified by the Architect. Accordingly, Library breached the contract by failing to pay Balfour at least $446,212.16 by November 13, 2018.

In the Respondent's Brief, Library erroneously asserts that all certified payment applications were paid. However, Balfour's representative David Simonton correctly testified that "pay application 43 was certified" and "that payment wasn't made." (Tr. 4392:8–13). The Record reflects that Library's position was that it initially withheld making any payment to Balfour on the certified amount of $556,408.01 until the lien filed by Guy M. Beatty Construction, LLC was bonded off. (Tr. 2192:19 – 2193:4). Of course, the lien only put in issue $110,195 of the $556,408 that had been certified for payment. In other words, the lien did not provide justification for denying payment of $446,212 which had been certified for payment. While the Contract

Documents provide that Balfour is to bond off liens filed by third-parties, they also provide that if Balfour fails to bond off such a lien, then Library may bond off the lien and deduct the associated costs from the amounts otherwise due to Balfour. (Balfour Ex. 56; General Conditions of the Contract § 9.3.1.2). Library did not bond off the lien, but it improperly withheld all payments to Balfour. Balfour bonded off that lien on January 7, 2019, (Library Ex. 42), and not until January 21, 2019—months after refusing to make payment of the undisputed amounts certified for payment—did Library notify Balfour that it was withholding further payments based on a December 2018 site visit conducted by the Architect and Mr. Bennett. (Library Ex. 43). At that time, Library had already breached the Contract by failing to make timely payment to Balfour for the amounts claimed and certified in Application No. 43. Accordingly, the Master's finding that Library did not breach the Contract, and that Balfour was owed nothing under the Contract is without evidentiary basis and is error.

B. Balfour was entitled to additional change orders and to compensation for such changes.

In the Respondent's Brief, Library's "response" to Balfour's arguments regarding the Master's error in failing to find that Balfour was entitled to additional changes orders and compensation for such changes is to state that the Master ruled that the change orders submitted into evidence were "unsupported by the facts and the Contract Documents." Library makes no other specific or substantive argument on this issue.

In his October 6 Order, the Master expressly found that for 25 of the RCOs in issue "had Contractor followed the terms of the Contract, Contractor would have been entitled to be paid and this RCO would have been granted." (R. __). Those 25 RCOs—which the Master found to constitute valid changes under the Contract—had a value of no less than $2,224,486.47. However, the Master and Library chose—in this instance—to rely upon the false premise that the failure to

strictly comply with the notice provisions in the Contract may serve as a legitimate basis for refusing to pay for work that was requested and performed.

As discussed in Balfour's Appellant's Brief, South Carolina law does not support such an improper and inequitable result. *Smith-Hunter Const. Co., Inc. v. Hopson,* 365 S.C. 125, 616 S.E.2d 419 (2005) and *Lazer Const. Co. v. Long*, 296 S.C. 127, 130, 370 S.E.2d 900, 902 (Ct. App. 1988), each stand for the proposition that where an owner knows of a claim, the failure of a contractor to follow exact contractual provisions regarding the claim is excused. Similar to *Lazer* and *Hopson*, the undisputed evidence in this case is that Library and the Architect had actual notice of Balfour's RCOs and claims. In fact as stated in Balfour's Appellant's Brief, the evidence reflects that Library authorized and approved the extra work that was the subject of Balfour's claims. *See* Appellant's Brief p. 23–24; Balfour Exs. 138, 141, 215; 72, 81, 143; 85; 305.

The error and inequity in the Master's refusal to find Balfour is entitled to payment for the work it performed is further exemplified by the Master's orders granting summary judgment to several of Balfour's subcontractors. In those Orders, the Master granted summary judgment to the subcontractors on the express finding that the subcontractors performed the work pursuant to their subcontracts, the work was accepted by Balfour and Library, and the subcontractors were entitled to be paid for the work they performed. (Order Granting Watson's Motion for SJ, at 4–5); (Order Granting Strong Tower's Motion for SJ, at 3–4); (Order Granting Premier SJ, at 10); (Order Granting Warco SJ, at 2, 4–5). The work performed by those subcontractors cannot constitute costs of work for which the subcontractors are entitled to payment but not constitute costs of work for which Balfour is entitled to payment. The Master's finding that the subcontractors performed the work pursuant to the contracts, and that it was accepted by Library, establishes that such amounts were a recoverable cost of the work for Balfour as well.

C. Balfour was entitled to an award of delay damages.

The Master erred in failing to award Balfour delay damages. As the fact-finder, the Master may not disregard uncontroverted evidence due to the Master's belief in a party or witnesses' apparent lack of credibility. *See Poston v. Se. Const. Co.*, 208 S.C. 35, 39, 36 S.E.2d 858, 860 (1946) (when the trial court disregards the testimony of an expert it must find other competent evidence in the record upon which to base its findings).

When a complex construction project is delayed and a dispute arises as to the parties' entitlement to damages for such delay a party may recover delay damages if it proves a specific allocation or apportionment of the delay by means of critical path method scheduling analysis. *See PCL Const. Servs., Inc. v. United States*, 53 Fed. Cl. 479, 485 (2002); *Youngdale & Sons Const. Co. v. U.S.*, 27 Fed. Cl. 516, 550 (1993); *Mega Const. Co. v. U.S.*, 29 Fed. Cl. 396, 424–25 (1993).

At trial, Balfour offered the testimony of Mark Doran, who was qualified by the Master as an expert in scheduling and delay analysis. (Tr. 714:16 – 715:2). Doran testified to having performed a critical path method analysis of Project delays. (Tr. 723:16 – 815:13), while Library's experts each expressly admitted that they did not perform a critical path method analysis of the possible delays on the Project. (Tr. 2872:3–17; 3058:20–24; 3059:25 – 3061:4). Thus, Balfour is the only party to present the necessary evidence to prove an allocation or apportionment of the delays support an award on a claim for delay damages. As the only party to present an expert who performed a critical path delay analysis and testified to the allocation of delays supporting the recovery of delay damages by Balfour, Balfour is entitled to recover its claimed delay damages based on such analysis. The Master's arbitrary refusal to accept the only competent evidence of delay damages was error.

III. No material or competent evidence justified the finding that Balfour breached the Contract causing Library $3,320,329 in damages.

In the Respondent's Brief, Library spouts a litany of immaterial contract provisions and purported duties owed by Balfour under the contract documents in an effort to suggest Balfour committed various breaches of the Contract. However, the only damages found by the Master to have been caused by any breach of contract by Balfour were delay liquidated damages and costs of corrective completion of work allegedly incurred for: repainting work, warranty work, laundry costs, cleaning fees, repair work, punch list repair work, fixtures and pool repairs. (Oct. 6 Order p. 42).

Since it is axiomatic that a necessary element of a breach of contract claim is damage caused by the breach, *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012), none of the other alleged performance failures by Balfour are relevant or material to the determination of whether the Master's award of $3,320,329 in damages for breach of contract is proper. For the following reasons, the award is not proper and must be reversed.

The Master awarded Library $3,320,329 in damages for purported breaches of contract by Balfour. Specifically, $1,483,090 was awarded for liquidated damages based on a delay in the completion of the Project. Additionally, $2,256,764 was awarded for costs purportedly expended by Library in connection with self-performing work that was either not performed or remedying work that was allegedly defective.

As stated by Balfour in its appeal and assignments of error by the Master, the problem is that Library never proved that the amounts awarded by the Master were, in fact, caused by breaches of the Contract by Balfour.

It is not enough that Library submit evidence of amounts it spent; the essential proof is that those expenditures by Library were caused, in fact and proximately, by inexcusable breaches of the Contract by Balfour. Library never introduced qualified, competent and material evidence that

breaches by Balfour were the cause of such expenditures. Library never proved that Balfour was the sole cause of the delay for which it claimed liquidated damages and it never proved that the so-called repair or completion costs incurred by Library in connection with such things as painting work were caused by Balfour having failed to perform the work required by the Contract Documents. In its Respondent's Brief, Library cannot and does not cite any record evidence to establish or support the Master's findings and awards.

Library identifies no material, competent or credible evidence to justify the finding that Balfour breached the Contract in a manner that would entitle Library to recover $1,483,090 in delay liquidated damages or caused $2,256,764.00 in cost of repair expenditures. Library failed to present to the Master, or this Court, competent and credible evidence that supports the award of either damage category.

A. Delay Liquidated Damages

Library sought to impose, and the Master did impose, delay liquidated damages against Balfour for every day of delay experienced during the Project. And that alleged delay was measured by simply counting every calendar day between the last approved completion deadline and the date of completion as acknowledged by Library. However, it is axiomatic that neither party to a construction contract is entitled to recover for delay which it caused or to which it contributed. This principle extends to the conclusion that when there exists concurrent delay, neither party may recover delay damages unless it proves a specific allocation of apportionment of the delay by means of critical path method scheduling analysis. *See PCL Const. Servs., Inc. v. United States*, 53 Fed. Cl. 479, 485 (2002); *Youngdale & Sons Const. Co. v. U.S.*, 27 Fed. Cl. 516, 550 (1993); *Mega Const. Co. v. U.S.*, 29 Fed. Cl. 396, 424–25 (1993).

In this case, the Record undeniably reflects that Library's own witnesses admitted that there were delays caused and contributed to by Library. Those witnesses admitted that there was

concurrent delay during the Project. For example, Library's scheduling expert, admitted that Library was responsible for delays to the Project, (Tr. 2894:15–19), and Library (Michael Bennett) *admitted* to Balfour's senior project manager (Tim Spano) that Library knew it had caused delays, disruptions and changes at the project. (Tr. 651:18–25).

Additionally, Library's witnesses admitted that they had not even undertaken (let alone completed) any sort of allocation or apportionment of delays by means of any sort of scheduling analysis. Indeed, Library offered no actual scheduling analysis and no evidence of allocation or apportionment of the various causes of delay. This utter lack of evidence presented by Library was its choice although its own witnesses admitted there were delays caused by Library and, at least, concurrent delay existed during the Project.

The Record does not contain proof of specific delay definitively caused by Balfour (as compared to concurrent delays) to support the imposition of liquidated damages. Library's argument, and its evidence in support of the Master's award of delay liquidated damages was overly, and inadequately simplified as: (1) the original schedule included a completion date; (2) the Project was not completed by that date; and (3) the Contract allows for an award of liquidated damages for each day the Project was not completed after the initial contractual completion date.

The mere fact that there was a delay in completion is not a sufficient basis for a finding of liability against Balfour for that delay. Under the law, not all delays warrant a finding of liability against a particular party. *Mega Const. Co.*, 29 Fed. Cl. at 425. And they do not support an award of compensation for delay to another party. *Id*. Each delay must be analyzed to determine whether it is excusable, and whether it is compensable or non-compensable. *Id*.

Library's expert (Mark Boe) recognized the fundamental need for analysis of who caused or contributed to the delay. He testified "[I]n a delay analysis, there has to be cause and effect. You have to be able to say, there was – here's the cause of the delay and there's an effect that

actually delayed something that was on the critical path. **So, you have to identify the critical path**, and **you have to say the specifics that delay it.**" (Tr. 2631:3–9)(emphasis added). However, Library's expert admitted that he did no critical path method analysis of the schedules or delays. (Tr. 2917:7–14; 2715:24 – 2716:2). Instead, he merely offered his opinion as to the purported flaws in the critical path analysis performed by Balfour's expert. Library's offered testimony, including its expert's opinions, has no value in proving a delay caused by Balfour because he admittedly failed to perform the necessary analysis. Moreover, Library's experts admitted that there were likely multiple causes of delay—including causes for which Library was responsible. (Tr. 2894:15–19; 2631:3–9). Thus, Library's own evidence demonstrates Balfour is not liable for all of the delay which occurred during the Project, and Library is not entitled to recover delay damages (liquidated or otherwise) for the entire period of alleged delay as the Master allowed.

In contrast, Balfour's expert offered the only relevant and competent evidence on such issues; however, the Master simply chose to disregard it. He purported to do so on some general exercise of discretion based on credibility, but South Carolina courts refuse to allow a fact-finder to disregard uncontroverted evidence based on a purported belief about the witnesses' lack of credibility. *See Poston v. Se. Const. Co.*, 208 S.C. 35, 39, 36 S.E.2d 858, 860 (1946). Nonetheless, the Master awarded Library the maximum possible delay liquidated damages and his findings and conclusions in this regard are an abuse of discretion and clear error.

B. Cost of Self-Performing Work

The damages awarded to Library on its breach of contract claim include $2,256,764.00 in purported costs incurred by Library to perform work on the Project. These purported costs include $1,661,144 to repaint all of the guest rooms. (Library Ex. 146B). However, there is no evidence in the record that Balfour breached the contract by failing to paint the rooms in

accordance with the contract requirements. In other words, the Record contains no evidence that a breach of the contract by Balfour caused the alleged cost of repainting. In fact, the evidence reflects that the painting performed by Balfour was in accordance with the Contract requirements and was approved by the Architect. (Balfour Exs. 150, 151 and 312; *see also* Tr. 1866:15–1868:21; 1870:6–1872:19). The repainting ordered by Library was not in accordance with the original Contract terms and requirements and constituted a change to the Contract by Library. Inexplicably, the Master simply awarded these damages to Library despite Library having presented any evidence to meet its burden of proof as to breach. The Master's lenience in not requiring proof from Library that it had satisfied all conditions to its claim, and not requiring competent evidence that a breach had actually occurred was quite inconsistent with the Master's approach to impose rigorous standards of proof on Balfour and to ignore volumes of evidence submitted by Balfour supporting its allegations of breach on the part of Library.

Balfour's contract with Library provided for Balfour to perform the work according to the plans and specifications provided in the Contract Documents by Library. Balfour was not obligated to perform work different than what was in the plans and specifications, and if Library wished to change the work as described in the plans and specifications, Balfour was entitled to be compensated with the time and money precipitated by the change.

According to the express terms of the Contract, Balfour was only required to correct work performed at the Project if such work failed to conform to the requirements of the Contract Documents and was rejected by the Architect. (Balfour Ex. 56, General Conditions of the Contract § 12.2.1). Furthermore, as set forth in the General Conditions of the Contract, it was the Architect, not the Owner (Library), who had authority to reject work that did not conform to the Contract Documents (§ 4.2.6), to make interpretations of the Contract

Documents, (§ 4.2.12) and to make decisions on matters of aesthetic effect consistent with the intent of the Contract Documents (§ 4.2.13).

It is undisputed that the Contract Documents provided for Balfour to paint the rooms with an eggshell finish. (Tr. 3339:2–13; 3339:20–3340:10). The Record also reflects unequivocally that even prior to Balfour's original painting the parties discussed and agreed that use of paint with an eggshell finish could be problematic in areas involving a lot of traffic or subsequent activity because such a paint finish is difficult to "touch up" (Tr. 3339:20–3340:10) and any imperfections in the paint would likely be more noticeable when compared to paint with a flat finish. (Tr. 1924:16–1925:6).

The Record in this case, shows in clear and undisputed testimony, that following Balfour's application of the eggshell finish paint in the guest rooms, that painting was approved, multiple times, by the Architect and that the painting work complied with the requirements of the Contract Documents. (Balfour Exs. 150, 151 and 312; *see also* Tr. 1866:15–1868:21; 1870:6–1872:19). The unequivocal record reflects that the Architect not only did not reject the painting performed by Balfour, the application of the paint with the eggshell finish in the guest rooms by Balfour was approved. (Balfour Ex. 312); (Balfour Ex. 303, Dep. of J. Faulkinberry, at 95:2–5 (the project architect expressly acknowledged that she was prepared to issue a Certificate of Substantial Completion for the guest rooms with the eggshell paint finish as applied by Balfour)).

The unquestioned evidence is that the Architect did not reject the paint with the eggshell finish applied by Balfour; but rather, it was Library's principal owner (Michael Bennett) who visited the Project in December of 2018 and unilaterally decided that he did not like the look of the existing paint with the eggshell finish and found it to be unacceptable. (Tr. 3255:6–14). After Mr. Bennett's visit in December of 2018, Balfour was asked to repaint the

guest rooms, not with an eggshell finish but with a flat finish. (Tr. 1923:8–17; 1929:5–11). When Library refused to enter a change order for the repainting, Balfour refused to do the changed and additional work. (Tr. 1931:3–22). Only thereafter did Library proceed to engage other contractors to repaint the guest rooms—not with an eggshell finish but with paint with a flat finish. (Tr. 1923:14–17; 1929:5–7).

Thus, there is no evidence in the Record to support a finding that Balfour's painting of the guest rooms was defective, or not in accordance with the requirements of the Contract Documents. In other words, there is no evidence that Balfour had breached the Contract with respect to its painting work, or that Balfour was the cause of the decision by Library to have the rooms repainted with the change in paint from the eggshell finish originally specified to the newly selected flat finish. In fact, the Record unequivocally reflects that the only reason Library repainted the guest rooms was Mr. Bennett's unilateral decision that he did not like the eggshell finish originally specified. (Balfour Ex. 304, Dep. of W. Faust, at 66:16–67:1 (testimony from the Owner's interior designer that the decision to repaint the guest rooms was strictly a decision on Library's part because Mr. Bennett did not like the eggshell finish previously specified)).

Library's other claims for defective or nonconforming work similarly fail. The uncontroverted evidence shows that: (1) Library's claim for water damage caused by an overflowing tub in the amount of $13,327.00 was caused by Library's painter, not Balfour, *see* (Tr. 4281:9 – 4283:5); (2) Library's claim for outsourcing laundry services in the amount of $140,193.00 was caused by restricted gas flow to the dryer because of a deficient design provided by Library, *see* (Tr. 4283:6 – 4287:15); (3) Library's claim for removal of a mock-up sample wall in the amount of $7,216.00 was really for costs associated with transporting the mock-up to Michael Bennett's farm, not a demolition cost chargeable to Balfour, *see* (Tr. 4287:16 – 4290:18);

and (4) Library's claim for replacement of ballroom chandelier crystals in the amount of $54,062 was not attributable to Balfour, *see* (Tr. 4290:19 – 4292:12).

In its Respondent's Brief, Library offers no opposition to these facts. Instead, Library relies on its own unsupported statements and the contention that it incurred costs to self-perform work—based on its own decisions and errors. Accordingly, the Court should reverse the Master's award of $2,256,764 to Library for breach of contract because there is no material or competent evidence that a breach of contract by Balfour caused the expenditures (damages) in issue.

IV. The Master made no finding that Balfour breached the Contract with an accompanying fraudulent act and, therefore, the Master's award of damages to Library on that alleged cause of action was error.

In Respondent's Brief, Library seeks to justify the Master's finding against Balfour on the claim for breach of contract accompanied by a fraudulent act based on the assertion that the Master "was correct in finding and concluding … that Appellant breached the Contract Documents with fraudulent intent." Even if such a finding could be justified, that is not sufficient to support the claim. The essential element of the claim is that Balfour breached the contract and the breach was accompanied by a "fraudulent act." *Floyd v. Country Squire Homes, Inc.*, 287 S.C. 51, 53, 336 S.E. 2d 502, 503 (Ct. App. 1985). Even a finding of fraudulent intent is not actionable without clear and convincing evidence of an accompanying fraudulent act. *Id.*, 287 S.C. at 54, 336 S.E.2d at 504; *Osborn v. Univ. Med. Assocs. of Med. Univ. of S.C.*, 278 F. Supp. 2d 720, 740 (D.S.C. 2003).

The Master—and Library—each failed to identify any fraudulent act that accompanied a breach of contract by Balfour.

The law is clear that to prevail on a claim for breach of contract accompanied by a fraudulent act, Library was required to establish three elements by clear and convincing evidence:

(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract; and (3) a fraudulent act accompanying the breach. *Conner v. City of Forest Acres*, 348 S.C. 454, 465–66, 560 S.E.2d 606, 612 (2002). A "fraudulent act" is a false representation made to induce another party to reasonably rely upon it and to change its position to its detriment and damage based on such reasonable reliance. *See Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 365, 334 S.E.2d 131, 135 (Ct. App. 1985). Critically, the fraudulent act must be connected with the breach itself both in time and character. *Floyd*, 287 S.C. at 54, 336 S.E. 2d at 504.

Library's only response to Balfour's argument that the Master erred in finding in Library's favor on this claim is reference to hypothetical statements (questions) raised by the Master in his Order. Such statements should not and cannot satisfy the clear and convincing evidence standard that is required to be met for a party to prevail on a claim for breach of contract accompanied by a fraudulent act. Without more, Library's claim fails.

Furthermore, Library offers no response or opposition to Balfour's argument that Library was required to have changed its position as a result of its reliance on a purported fraudulent act or misrepresentation by Balfour. *See Kelly v. Nationwide Mut. Ins. Co.*, 278 S.C. 488, 298 S.E.2d 454, 455 (1982) (recognizing that reliance on the misrepresentation must be proved to prevail on a cause of action for breach of contract accompanied by a fraudulent act); *Vann v. Nationwide Ins. Co.*, 257 S.C. 217, 185 S.E.2d 363 (1971) (affirming the trial court's dismissal of the claim for breach of contract accompanied by a fraudulent act on the grounds that the plaintiff failed to allege he changed his position because of any alleged fraudulent act). There is no clear and convincing evidence or proof in this case that any "fraudulent act" by Balfour was committed which is connected in time or character to any purported breach of the Contract, or which in any way leads to a reasonable change in position by Library. (October 6 Order, p. 41–42).

Accordingly, the Court should reverse the Master's Order and Judgment on this cause of action because the Order contains no finding that any breach of contract by Balfour was accompanied by a fraudulent act, and the Order contains no finding that Library changed its position based on any purported fraudulent act by Balfour.

V. There exists no predicate for any award of punitive damages in the case since there is no valid finding of a breach of contract by Balfour accompanied by a fraudulent act.

Respondent's Brief utterly fails to respond substantively to Balfour's assignments of error and arguments regarding the Master's error in awarding punitive damages to Library. As set forth above, there is no predicate for any award of punitive damages in this case because there is no valid finding of a breach of contract accompanied by a fraudulent act by Balfour. *See Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 142, 494 S.E.2d 449, 454 (Ct. App. 1997) (stating that a mere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to an award of punitive damages). Furthermore, Balfour's assignments of error and arguments raise numerous other procedural errors by the Master in his purported award of punitive damages. Nonetheless, Library failed to address the asserted errors and arguments in its Respondent's Brief, either legally or factually. The unaddressed errors and arguments include:

1. The Master never made the necessary finding that Library had proven during the trial, by clear and convincing evidence, that its harm and damages were the result of Balfour's willful, wanton, or reckless conduct—and without such a finding there is no justification for any further proceedings about an award of punitive damages.

2. The Master erred in considering, and relying upon inadmissible and improper evidence to justify the award of punitive damages.

3. The Master erred in sua sponte ordering a bifurcated hearing on the issue of punitive damages nearly twenty-two months after the conclusion of the trial and the close of evidence.

4. The Master lacked jurisdiction or authority to make any further orders or findings with respect to entitlement or award of punitive damages after October 16, 2023.

Library does not address or respond to any of these assignments of error or arguments in its Respondent's Brief. Rather, without addressing the merits of Balfour's arguments, Library merely "adopted" the Master's April 12, 2024 order. The South Carolina Appellate Court Rules do not provide for a party to "adopt" a trial court order in place of making an argument in opposition to the issues raised by the appellant. *See Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 346–47, 907 S.E.2d 129, 139 (Ct. App. 2024), *reh'g denied* (Oct. 24, 2024) ("While these documents are included in the record on appeal, an appellant cannot minimize its burden to make cogent, supported arguments in its brief by pointing to other documents, ostensibly circumventing the page limit requirements of Rule 208(b)(5), SCACR."); *see also* 5 Am. Jur. 2d Appellate Review § 488 ("Incorporating by reference or adopting by reference arguments from previous filings in an appellate brief is improper because it attempts to shift, from the litigant to the court, the task of locating and synthesizing the relevant facts and arguments, and to circumvent the rule limiting the length of briefs."); *Trammell v. State*, 622 So. 2d 1257, 1261 (Miss. 1993) (stating that the respondents "abandoned hope of affirmance" on an issue as "they did not address the issue in their brief" and this failure "to reply to the issue is tantamount to a confession that [the appellant's] position is correct").

Under the circumstances, the Court should treat Library's failure to respond substantively to Balfour's arguments as an admission that Balfour's assertion of the above-referenced errors committed by the Master in awarding punitive damages are correct. *See Shirey v. Bishop*, 431 S.C. 412, 431, 848 S.E.2d 325, 335 (Ct. App. 2020) ("[T]he appellate court may treat the failure to respond as a confession that the appellant's position is correct."); *First Union Nat'l Bank v. FCVS Communications*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (stating that if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds,* 328

S.C. 290, 494 S.E.2d 429 (1997); *Turner v. S.C. Dep't of Health & Env't Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) (same).

VI. Library offers no substantive response in opposition to Balfour's arguments identifying the Master's error in awarding Library attorneys' fees.

In response to Balfour's assignment of error and arguments regarding the Master's error in awarding Library attorneys' fees, Library simply states that it was the prevailing party under the Mechanic's Lien statute and, therefore, the Master did not err in awarding it attorneys' fees. Library offers no substantive response to the issues raised by Balfour and wholly ignores Balfour's arguments that: (1) the Master erred in awarding Library attorneys' fees associated with the litigation other than those fees directly related to the defense of Balfour's cause of action to foreclose its Mechanic's Lien; and (2) the Master erred in accepting and considering the Memorandum in Support of Attorneys' Fees and Affidavit of Marvin Infinger purportedly to justify a fee enhancement because those documents were submitted to the Master after Library's deadline to make such submissions.

VII. There was no basis in law, and no legal predicate for the Master's award of the fees of Library's auditor pursuant to the Declaratory Judgment Act, and Library fails even to address the legal and factual assignments of error on this issue in its Respondent's Brief.

Library offers no argument, and cites no authority, in response or in opposition to Balfour's assignment of error and arguments regarding the Master's error in awarding Library $655,197 for the witness fees and costs for the work of Library's expert witness Hadley. In the Appellant's Brief, Balfour raised three specific arguments which separately justify reversing the Master's award of expert fees to Library:

1. The Master erred in awarding Library any relief pursuant to its counterclaim for Declaratory Judgment, because Library's counsel withdrew that counterclaim on the record during trial.

2. The Master erred in concluding Library was entitled to any relief under the South Carolina Declaratory Judgment Act.

3. The Master erred in awarding Library $655,197 in "costs" incurred for the services of Library's expert witness Hadley pursuant to the S.C. CODE ANN. § 15-53-100, because such fees are not subject to award under the statute.

Neither Library, nor the Master, have identified any authority permitting the Master to award Library its expert costs or witness fees pursuant to the Declaratory Judgment Act. Instead, Library merely argues that it was the prevailing party under the South Carolina Mechanic's Lien statue and the South Carolina Declaratory Judgment Act. However, Library offers no authority to support its bald assertion that such expert fees are recoverable costs under the Declaratory Judgment Act. As argued by Balfour, as a matter of law, they are not. Moreover, Library offers no response to Balfour's argument that the purported counterclaim for Declaratory Judgment is nothing more than a veiled or repackaged claim for breach of contract and an additional argument in opposition to the mechanic's liens filed by Balfour and the subcontractors and, therefore, when viewed in the proper light, the so-called declaratory judgment cause of action is inherently defective and is not a proper vehicle for Library to pursue other claims.

Furthermore, under the Contract Document Library had the option to perform an audit of the project costs and it chose to do so in the course of this litigation. Therefore, Library incurred these costs regardless of the litigation before the Court because it was exercising its rights under the Contract Documents. As such, the costs incurred by Library in hiring Hadley to perform the audit would have been incurred by Library regardless of its claim for declaratory judgment.

VIII. Library identifies no basis for affirming the Master based on other grounds found in the Record.

As a final catch-all argument, Library requests the Court affirm the Master pursuant to Rule 220(c), SCACR, based upon any ground(s) appearing in the Record on Appeal. However, Library 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, Library'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 Library's failure to identify any additional sustaining ground in its Respondent's Brief.

CONCLUSION

For the reasons set forth herein, Balfour respectfully requests the Court grant Balfour the relief it requests in its Appellant's Brief.

[SIGNATURE ON FOLLOWING PAGE]

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September 25, 2025
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2024-000788
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 Library Associates, LLC is the Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on September 25, 2025, a copy of **Appellant's Initial Reply Brief** was served on all counsel of record via email containing the above referenced documents to counsels' individual AIS email addresses:

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