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.

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STATEMENT OF THE CASE

This litigation arises out of an attempt by Balfour Beatty Construction, LLC ("Balfour") to recover millions of dollars it expended, and has not been paid, for the construction of Hotel Bennett in Charleston, South Carolina (the "Hotel"). Balfour performed the work and is entitled to the payment pursuant to its contract with the Hotel owner (the "Contract"), Library Associates, LLC ("Library").

Specifically, Balfour sought to recover three elements of costs or damages to which it was entitled under the Contract. First, there were amounts owed in the normal course of performance under the Contract for the work performed and the costs incurred within the Guaranteed Maximum Price ("GMP") of the Contract. These amounts were due from Library as progress payments under the Contract, but the payments were not made by Library in breach of its contract obligations. Second, there were additional amounts owed for work that resulted from changes imposed by Library to the scope and performance requirements of the Contract. These changes were identified by Balfour to Library and the project architect throughout the contract performance period, but Library did not execute appropriate change orders covering this work as provided in the Contract Documents. Executed change orders would have increased the GMP and documented Balfour's entitlement to additional payment and extensions of the contract time. Third, there were amounts owed in connection with claims asserted by Balfour under the Disputes clause of the Contract Documents. In addition to Balfour's causes of action arising under the Contract for these items, the case also involved Balfour's attempt to recover these various amounts pursuant to its assertion of a lien under the South Carolina Mechanic's Lien statute.

The Master erred in this case by failing to award Balfour the amounts owed for the work it performed. He failed to award Balfour the allowable costs it incurred in performing the work within the existing (as adjusted by executed change orders) GMP under the Contract. He also failed

to recognize and award the change order work performed by Balfour that would increase further the GMP and be recoverable. Finally, he failed to properly assess the claims submitted pursuant to the Disputes clause and to award the damages due to Balfour arising therefrom.

The Master also erred in awarding Library:

a. liquidated damages for delays in completion of the work;

b. damages for so-called non-conforming or incomplete work;

c. punitive damages for a purported breach of contract accompanied by a fraudulent act;

d. attorney's fees improperly awarded under the mechanic's lien statute; and

e. the fees and costs of Library's expert witness under the Declaratory Judgment Act.

Each of these errors will be addressed in turn in the following arguments. However, for context, the significant contractual and factual background is summarized as follows.

Library contracted with Balfour, as the Construction Manager/General Contractor, to build the Hotel. (R-7311). The Contract required Library to provide the necessary plans and specifications to Balfour by which the Hotel could be constructed. (R-7313, § 1.1). Balfour was to be paid for constructing the Hotel according to the provided plans and specifications on the basis of the costs it incurred in accomplishing that construction, plus certain fees, subject to a GMP. (R-7321, § 5.2.1). Of course, the GMP could change as a result of change orders modifying or altering the scope of the work under the Contract (the "Work") and increasing the expected costs or time for construction. (R-7321, § 5.2.2).

The original Contract GMP was $59,344,747; however, during the course of the performance of the construction of the Hotel (the "Project"), there were mutually agreed upon change orders (22 of these) between Balfour and Library. These change orders (sometimes referred to as Owner Change Orders or OCOs) increased the GMP to $65,238,467.99. (R-7333, Ex. A,

§ A.1.1.1; R-7422, Balfour Ex. 226; R-5232, 4195:3-10). In addition to the agreed upon and settled OCOs, there were additional requested change orders ("RCOs") submitted by Balfour and memorialized in each Application for Payment. These RCOs to which Balfour is entitled would result in further increases to the GMP, and the costs incurred in accomplishing the changes would be additional recoverable or allowable costs of the work. (R-6113, Balfour Ex. 12; R-5177–5178, 4141:2 – 4142:7; R-9554, Balfour Ex. 350). Finally, the last component of the litigation is Balfour's attempt to recover costs it incurred because of such things as the interferences and delays experienced by Balfour on account of various acts and omissions by Library including defects in the design provided by Library. This last component of the litigation constitutes "Claims" by Balfour pursuant to the Contract. (R-7281, Gen'l Cond. § 4.3).

Pursuant to the Contract, Balfour was entitled to receive monthly progress payments. These progress payments were to be based upon an assessment of the percentage of completion of the work as described in Article 7 of the Contract. These progress payments were not to be based on audited costs. Generally, throughout the performance period, in accordance with the Contract's terms, Library paid Balfour monthly progress payments as described. (R-7325, § 7.1). The Architect certified and Library, in fact, paid Balfour the first 42 applications for progress payments submitted by Balfour under the Contract, covering the time period from April 1, 2015, to September 30, 2018. (R-15415, Library Ex. 35). However, beginning with Balfour's Application for (progress) Payment No. 43, covering the time period of October 1-31, 2018, Library failed and refused to make any additional payments. (R-23085, R-23230, R-23430, Library Exs. 141, 142, 143).

At the time Library failed and refused to make additional payments to Balfour, the approved and existing GMP was $64,924,641.87, and the prior total of the payments made to Balfour was only $59,994,390.35. (R-15415, Library Ex. 35). At that same time, Balfour had

already identified 150 additional RCOs, and given notice of them to Library and its Architect. (R-15419; R-6105–6112, Balfour Ex. 11). Although not being paid by Library, Balfour and its subcontractors, nonetheless, continued to prosecute the Work to completion. (R-7091–7161, Balfour Ex. 27). Due to Library's failure and refusal to make payments, eventually Balfour and a number of its subcontractors exercised their rights to file mechanic's liens against the Hotel property in order to secure their rights to payments as allowed by South Carolina law. (R-114–115). The foreclosures of those mechanic's liens by Balfour and various subcontractors were additional issues in the litigation.

I. Project Background

A. Initial Designs and Development of the Hotel

Initially, the exterior of the Hotel was designed by the architectural firm Fairfax & Sammons. Fairfax & Sammons's design was largely schematic and contained virtually no interior details. (R-9096, 50:6-16). After Fairfax & Sammons completed its initial work on the design of the proposed hotel, Library hired Goff D'Antonio, to provide more complete design services; however, Library subsequently terminated Goff D'Antonio. (R-9095, 47:22 – 49:14). Thereafter, Goff D'Antonio filed a mechanic's lien against the Hotel property for $435,000 in design services for which Library did not pay D'Antonio. (*Id.*). That claim was ultimately resolved for $260,000. (*Id.*).

On January 29, 2014, Library finally entered into a contract with Winford Lindsay & Associates ("WLA" or "Architect"), to serve as the architect for the Project. (R-9093, 39:7-24; R-7170-7190, Balfour Ex. 46). Separately, Library also contracted with Jim Clements to serve as its Owner's Representative. (R-7162–7169, Balfour Ex. 42).

B. Library / Balfour Contract

1. Contract GMP and Cost of the Work

The September 22, 2014, Contract between Balfour and Library included an original GMP of $59,344,747.00. (R-7333, § A.1.1.1). The Contract defined the Cost of the Work as "costs necessarily incurred by [Balfour] in the proper performance of the Work." (R-7322, § 6.1). Such costs included, among other things: (1) wages for construction workers employed by Balfour; (2) wages or salaries of Balfour's supervisory and administrative personnel; (3) payments owed to subcontractors in accordance with the subcontract agreements; and (4) costs of materials and equipment incorporated or to be incorporated in the completed construction. (R-7322, § 6).

2. **Change Orders**

The Contract provided for increases to the GMP pursuant to executed change orders or construction change directives. (R-7321, § 5.3; R-7287, Gen'l Cond. § 7). Change Orders and Change Directives were to be prepared by the Architect and signed by Library, Balfour, and the Architect. (R-7288, Gen'l Cond. § 7.2; § 7.3.1). As stated earlier, there were a total of 22 agreed upon Change Orders prior to the litigation which increased the GMP from the original $59,344,747.00 to $65,238,467.99. (R-7422, Balfour Ex. 226; R-23430, Library Ex. 143; R-5232, 4195:3-10).

3. **Claims and Disputes**

The Contract recognizes that a Claim or a Dispute may arise between the parties during the Project. (R-7281). Section 4.3 of the General Conditions defines such Claims and Disputes and the process for resolution. (*Id.*). "A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." (R-7281–7282). A Claim "also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." (R-7281–7282, § 4.3.1). Section 4.3.1.1 of the General Conditions provides that the Contractor will attach to each Application for Payment a schedule of outstanding

and unresolved Claims and RCOs. (*Id.*) Library and the Architect shall then rely on the schedule as notice of the Contractor's claims. (*Id.*). Section 4.4.1 of the General Conditions then allows that claims and disputes shall be referred to the Architect for initial review and decision. (R-7283, § 4.4.1). Upon receipt of a claim, the Architect had ten (10) days to: (1) request additional supporting data; (2) reject the claim in whole or in part; (3) approve the claim; (4) suggest a compromise; or (5) advise the parties that the Architect was unable to resolve the claim. (*Id*., § 4.4). The Architect was required to issue a written decision on all claims submitted by either party. (R-7284, § 4.4.5). Beginning in December 2015, each of Balfour's Applications for Payment had attached to it, including expressly as part of each conditional partial waiver and release of lien, a schedule that specifically identified the pending RCOs and Claims for which it was reserving its rights. (R-6105–6112, R-7393–7421; R-09778, R-16130, R-17639, Library Exs. 3, 82, 114). The Architect and Library had notice of these matters on at least a monthly basis.

4. Accounting and Library's Right to Audit

Under the Contract, Balfour kept records and accounts of the Cost of the Work. (R-7325, § 6.11.1).

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. (R-7327, § 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, of the cost records or the actual costs.

II. The Project

A. Change Orders and Increases to the GMP

During the course of the Project, numerous and various circumstances arose which altered the scope of the work Balfour was required to perform. Such circumstances include decisions by Library to modify the work to be performed. Some were major decisions by Library to alter in substantial ways the nature and scope of the Project—such as a decision to convert the guest rooms on the sixth through eighth floors of the Hotel to luxury suites—and some changes were necessitated by a myriad of errors and omissions in the plans and specifications provided by Library. The executed bilateral OCOs (1-19) increased the GMP to $64,924,641.87. (R-7422, Balfour Ex. 226). Furthermore, after the issuance of OCO 19, Balfour submitted additional RCOs, including RCOs 20, 21, and 22, and while Library failed to execute formal OCOs covering those RCOs 20, 21, and 22, its witnesses do not dispute them. (R-9049, Balfour Ex. 292; R-5232, 4195:3-10). As a result of the numerous change orders, including RCOs 20, 21 and 22, the adjusted GMP was increased to $65,238,467.99. (R-9050).

At the time Library stopped paying Balfour, Library had paid Balfour only $59,994,390.00 against the then existing GMP of $64,895,381.83. (R-15416). Thus, a balance of $4,900,991.83 remained under the existing GMP for payment to Balfour of the Cost of Work reflected in Balfour's progress payments applications to cover the existing, recognized scope of work (even before further increases due in connection with Balfour's outstanding RCOs and Claims). Library continued in its refusal to make additional payments to Balfour on this balance.

B. Delays and Disputes

The Project was initially intended to be complete within twenty-eight (28) months from the issuance of a Notice to Proceed. (R-7335). However, substantial completion of the Project was delayed for various reasons and causes including (i) a 1,000-year flood event (R-1767, 733:12–18); (ii) issues related to defective, incomplete and new designs provided by Library (R-1768–1778, 734:20–744:19; R-1790–1796, 756:21–762:25; R-1797–1805, 763:1–771:13); and (iii)

Library's failure to make timely design and materials selections. (R-1805–1836, 771:15–802:23). The Project was also impacted and delayed by Library's decision to transform, both structurally and esthetically, the guest rooms on floors 6 through 8 to luxury suites after the start of construction. (R-1271–1272, 237:5–238:8). The issues of the causes and durations of all delays in the completion of the work were disputes and involved separate claims in the litigation.

III. Mechanic's Liens and Pleadings

On January 25, 2019, having not been paid for its work on the Project since 2018, Balfour recorded and served a mechanic's lien against the Hotel property in the amount of $8,409,658.54. (R-15739).

On March 5, 2019, Balfour commenced this action against Library to foreclose its mechanic's lien. Balfour also asserted other causes of action to recover payment for the work performed on the Project. (R-247). In response, Library filed an Answer and alleged counterclaims against Balfour. (R-274). On May 15, 2019, Library filed an Amended Answer and Third-Party Complaint asserting counterclaims against Balfour and third-party claims against certain subcontractors. (R-287).

Between December 28, 2016, and May 2, 2019, several subcontractors recorded their own mechanic's liens against the Hotel property and, thereafter, several subcontractors filed separate actions to foreclose their respective mechanic's liens, and also to allege other causes of action against both Balfour and Library to recover payment for work performed.

On July 23, 2019, Balfour amended and served its statement of mechanic's lien. The amount of the lien increased to $12,066,147.09. (R-7384, R-7391).

By order dated October 2, 2019, the court authorized Balfour to amend its Complaint to include a cause of action for foreclosure of its amended mechanic's lien.

On November 18, 2019, the circuit court entered an order referring the case to the Charleston County Master-In-Equity, the Honorable Mikell R. Scarborough (the "Master"). The circuit court also issued orders consolidating the subcontractors' actions with Balfour's suit against Library.

On October 12, 2020, Balfour filed a Second Amended Complaint asserting causes of action against Library, including: (1) breach of contract; (2) quantum meruit; (3) failure to make a reasonable investigation of a claim pursuant to S.C. CODE ANN. § 27-1-15; (4) indemnity; (5) breach of the implied warranty of sufficiency of the plans and specifications; and (6) breach of contract accompanied by a fraudulent act, among others. (R-509).

On October 20, 2020, Library filed an Answer and Counterclaims in response to Balfour's Second Amended Complaint and asserted counterclaims against Balfour for: (1) breach of contract; (2) breach of contract accompanied by fraudulent act; (3) indemnification; (4) declaratory judgment; (5) violation of the South Carolina Unfair Trade Practices Act; and (6) civil conspiracy. (R-537).

Prior to, or in the early days of the trial, the Master decided and issued Orders granting the summary judgment motions in favor of subcontractors Strong Tower Corporation, Inc.; Watson Electrical Construction Co., LLC; Low Country Case and Millwork, Inc.; Premier Exteriors, LLC; Cook and Boardman; Quantum Coatings, LLC; Warco Construction, Inc. on their breach of contract causes of action against Balfour. In his Orders granting summary judgment, and awarding damages to those subcontractors, the Master held expressly 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 pursuant to their subcontracts. (R-046–47); (R-019–20); (R-095).

The remaining causes of action, counterclaims and defenses in this matter were tried before the Master on non-consecutive days beginning on September 13, 2021, and concluding on December 3, 2021. As of December 3, 2021, both parties rested their cases, and the Trial Record was closed. At the conclusion of the trial, the Master requested Balfour and Library prepare and submit proposed orders. (R-5546–5547).

IV. October 6, 2023 Order

On October 6, 2023, (approximately 22 months after conclusion of the trial) the Master issued his Order and Judgment as follows:

1. Judgment is to be entered in favor of Library Associates, LLC on its breach of contract cause of action against Balfour Beatty Construction, LLC in the amount of **$3,320,329.00**. This amount is arrived at by adding the liquidated damages sum ($1,483,090.00) and the cost to complete damages ($2,256,764.00) for a subtotal of $3,739,854.00. The contract balance of $419,425.00 is then subtracted for a setoff to arrive at the judgment amount of $3,320,329.00.

2. Judgment is to be entered in favor of Library Associates, LLC on breach of contract accompanied by a fraudulent act cause of action against Balfour Beatty Construction in the amount of **$3,320,329.00**.

3. A hearing on punitive damages will be set by future Order of this Court.

4. Library Associates, LLC is hereby instructed to submit its attorneys' fees and costs petition as the prevailing party against Balfour Beatty Construction, LLC, Lithko Contracting, LLC, Watson Electrical Construction, Co., LLC and Old North State Masonry, LLC under the mechanic's lien statute, S.C. Code Section 29-5-10, et seq., within thirty (30) days of the date of this Order.

5. Library Associates, LLC is further instructed to submit an affidavit of Hadley's costs pursuant to S.C. Code Ann. Section 15-53-100 within thirty (30) days of this Order. (R-159).

Purportedly underlying his ultimate Judgment, the Master stated a number of so-called findings and conclusions in the 46-page text of the October 6 Order, including:

> (1) Balfour failed to perfect its Mechanic's Lien pursuant to S.C. CODE ANN. § 29-5-90 and that the mechanic's liens were excessive and duplicative; (2) Balfour failed to comply with the condition precedent of the Contract of obtaining an initial decision on its claims from the architect prior to commencing the present litigation

and that such a failure of the condition precedent is fatal to Balfour's claims in the litigation; (3) Balfour never submitted a final payment request, the documentation required pursuant to Section 7.2.1 of the Contract, a final accounting or the documentation required pursuant to Section 7.2.2 of the Contract; (4) Balfour was not entitled to recover for any of the RCOs based on a purported failure to follow the Contract's terms; (5) Balfour failed to meet its burden of proof for its claims and, therefore, was entitled to no recovery on those claims; (6) It could not be determined that any of the amounts claimed by Balfour constituted Costs of the Work under the Contract; (7) Balfour was liable to Library for breach of contract accompanied by a fraudulent act; (8) Balfour breached the Contract; (9) Library was the prevailing party under the Mechanic's lien statute and, therefore, entitled to an award of attorneys' fees and costs in accordance with S.C. Code Ann. § 29-5-10, *et seq.*; (10) Library did not breach the Contract; (11) Library did not breach the implied warranty of the adequacy of the plans and specifications; (12) Library was entitled to relief pursuant to the South Carolina Declaratory Judgment Act and that, pursuant to the Act, he could award Library all costs incurred for the services of Hadley; (13) Library's claim for violation of the South Carolina Unfair Trade Practices Act failed because this is a private contract dispute which does not affect the public interest; (14) Library's failed to prove its claim for civil conspiracy; and (15) Balfour had a contractual duty to perform the audit. (R-114–159).

V. Post-Trial Hearings and Orders

On October 16, 2023, Balfour filed a Motion to Alter or Amend the Master's October 6, 2023, Order. (R-23905).

On November 6, 2023, as required by the deadline established in the October 6 Order, Library filed its Petition for Attorneys' Fees and Costs. (R-24077). Library's Petition was accompanied by an affidavit from Library's counsel in which he stated under oath that the "total amount of attorneys' fees costs spent in fees and costs in this litigation is $2,026,278.55." (R-24081). Library did not support its Petition at the time of filing with any invoices or time entries justifying the attorneys' fees claimed in the Petition or the affidavits. (R-24077–24085).

On December 6, 2023, and again on February 14, 2024, counsel for Lithko Contracting, LLC and Old North State Masonry, LLC communicated with Library's counsel requesting the documentation supporting the claimed attorneys' fees and costs. On February 5, 2024, Balfour's counsel communicated in writing with Library's counsel requesting Library immediately provide

any and all backup documentation for the claimed attorneys' fees. Again, Library ignored the requests and provided no response.

On February 16, 2024, the Master noticed a hearing on Library's Petition for Attorney's Fees and Costs for March 13, 2024. On March 5, 2024 (18 days after the Master's notice of the hearing), Library finally produced copies of the legal fees invoices for the period October 2016 to October 2023. This production was one day prior to the established deadline for the parties to file their written submissions and only eight (8) days before the scheduled hearing on the Petition.

Two days later, on March 7, 2024, Library filed a memorandum (not even an amended petition) arguing—for the first time—that it was entitled to an "enhanced" award of legal fees in an amount 50% higher than the $2,026,278.55 set forth in its Petition. (R-24162–24172). Despite the fact that the deadline for filing affidavits in support of its Petition had passed, Library attached an affidavit of Marvin Infinger to its memorandum. *See* Rule 6(d), SCRCP; *see also* (R-24198).

On March 13, 2024, a hearing was held that included Balfour's Motion to Alter or Amend the October 6, 2023, Order and Library's Petition for Attorney's Fees. On April 2, 2024, an additional hearing was held on the punitive damages issue.

On April 12, 2024, the Master issued his Order awarding Library Attorneys' Fees in the amount of $2,127,592. (R-194). The Master stated this amount reflected reducing the attorneys' fees requested by thirty percent (30%) for work unrelated to the mechanic's lien and then applying a fifty percent (50%) lodestar fee enhancement. (R-196). Thus, the Master awarded Library attorney's fees under the mechanic's lien statute in an amount greater than requested in the Petition and greater than the amount its counsel admitted had been incurred and paid by Library for the entire litigation. The Master also awarded Library, purportedly pursuant to the South Carolina Declaratory Judgment Act, the costs claimed by its expert witness Sam Hadley in the amount of $655,197.00. (R-197).

On April 12, 2024, the Master entered an order awarding Library $10,000,000 in punitive damages on its cause of action for breach of contract accompanied by a fraudulent act. (R-200). In that Order, the Master instructed Library to elect its remedy between its causes of action for breach of contract and breach of contract accompanied by a fraudulent act within twenty (20) days. (R-209).

On April 22, 2024, Balfour filed a Motion to Alter or Amend the Master's Order awarding Library Punitive Damages. (R-25308).

On April 29, 2024, the Master entered an order granting in part, and denying in part Balfour's April 22, 2024, Motion to Alter or Amend the Order awarding Library Punitive Damages. In that Order, the Master amended the April 12, 2024, Order awarding Punitive Damages to include Library's cause of action for declaratory judgment as among its choice for election of remedy. (R-231).

On May 2, 2024, Library elected its remedy and award pursuant to its cause of action for breach of contract accompanied by a fraudulent act. (R-25311–25312). However, Library also asserted that it was entitled to recover a separate remedy, costs which were awarded pursuant to its claim for declaratory judgment. (*Id.*). In total, Library claimed a total amount of $16,103,118.00. (*Id.*).

On May 6, 2024, the Master entered a new judgment in favor of Library. The Judgment entered on May 6, 2024, includes the following amounts:

1. $3,320,329 in actual damages for Library's claim for breach of contract accompanied by a fraudulent act;

2. $10,000,000.00 in punitive damages for Library's claim for breach of contract accompanied by a fraudulent act;

3. $655,197 in costs incurred by Library regarding the work performed by Hadley pursuant to Library's claim for declaratory judgment; and

4. $2,127,592 in attorneys' fees awarded to Library pursuant to the mechanic's lien statute (S.C. CODE ANN. § 29-5-20).

(R-234).

On May 9, 2024, Balfour filed a Motion to Alter or Amend the Master's May 6, 2024 Order on the grounds that the judgment improperly included the award of $655,197.00 in costs pursuant to Library's claim for declaratory judgment—which it elected not to recover when it elected the remedy pursuant to its cause of action for breach of contract accompanied by a fraudulent act. (R-25314).

On May 15, 2024, the Master entered an order denying Balfour's Motion to Alter or Amend the October 6, 2023, Order, and Balfour's Motion to Alter or Amend the Award of Punitive Damages. (R-240). This appeal follows.

STANDARD OF REVIEW

When an action at law is tried without a jury, the scope of review afforded to the appeal court extends to the correction of errors of law. The review of the Master's final judgment and factual findings allows the appeal court to reverse when they are without evidence that reasonably supports those findings or are controlled by an erroneous application of the law. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 397, 450 S.E.2d 87, 92 (Ct. App. 1994); *J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc.*, 441 S.C. 272, 277, 892 S.E.2d 558, 561 (Ct. App. 2023). "Questions of law, however, are reviewed de novo." *Mozingo & Wallace Architects, L.L.P. v. Grand*, 379 S.C. 478, 483, 666 S.E.2d 267, 270 (Ct. App. 2008) (citation omitted).

In cases of equity decided in a non-jury trial, the appeal court may weigh the evidence and adopt findings of fact contrary to the findings of the Master. *Stoneledge v. IKM Dev.*, 435 S.C. 109, 119, 866 S.E.2d 542, 548 (2021) ("the standard of review [for equitable issues] is de novo

and allows us to find facts in accordance with our own view of the ponderance of the evidence."); *see also Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012).

Even in non-jury trials, the findings and conclusions of the court must be supported by competent evidence. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). In practice, this means that the findings and conclusions must be supported by admissible evidence. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001). From the opposite perspective, a Master's findings will be reversed when no evidence in the record exists to support such findings. *Steeger, K.G. v. Otto Zollinger, Inc.*, 287 S.C. 207, 336 S.E.2d 870 (1985). In this regard, arguments of counsel received by the Master are not evidence. *Owens v. Stirling*, 438 S.C. 352, 882 S.E.2d 858 (2023); *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (observing that mere allegations are not evidence and "[a]rguments of counsel are also not evidence").

In deciding whether the evidence reasonably supports a master's finding, the Court of Appeals must examine the totality of the record. *See Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 856 S.E.2d 550 (2021).

A fact-finder may not make findings inapposite to uncontroverted evidence. *See Broach v. Carter*, 399 S.C. 434, 732 S.E.2d 185 (Ct. App. 2012) (wherein the Court of Appeals reversed even a jury's finding that defendant was liable for tortious interference with a contract where the evidence only established that the defendant was justified in his actions). This also means that a fact-finder may not disregard uncontroverted evidence due to the fact-finder'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); *see also Potts v. Yager*, 2017 WL 6508735 (Ct. App. 2017) (wherein it was determined that the trial court erred in concentrating

on Appellants' perceived lack of credibility as to the contents and the values of the alleged contents inside a trailer in determining that "damages remain unproven.").

ARGUMENTS

I. THE MASTER ERRED IN FINDING AND CONCLUDING THAT BALFOUR IS NOT ENTITLED TO ANY ADDITIONAL PAYMENTS UNDER THE CONTRACT DOCUMENTS.

A. The undisputed evidence is that Library breached the contract by failing and refusing to make progress payments to Balfour when due.

The Contract between Balfour and Library provides for Balfour to be paid "the Contract Sum" which, in general, is comprised of the "costs necessarily incurred by [Balfour] in the proper performance of the Work," plus all fees provided for in the Contract. The ultimate payment amount is subject to the final adjusted GMP.

Library was obligated under the Contract to make monthly progress payments to Balfour. Those payments were due not on the basis of audited costs of the work, or even reported costs of the work, but on the basis of the observed percentage of completion of the work as set forth in Balfour's schedule of values. The limitation on the amount payable to Balfour was the adjusted GMP at the time of the application for payment.

The evidence is uncontroverted that Library breached the Contract by failing and refusing to make progress payments due to Balfour after Application for Payment 42—covering work through September 30, 2018. When Library failed to make those progress payments, the amount of final payment due to Balfour under the Contract was not the issue. Indeed, the final payment to become due was not even determinable until all outstanding change orders and claim/dispute issues were resolved. Only after those issues were resolved could the final cost of work and the final adjusted GMP be determined. Then, once those matters were determined, the actual costs of the work reported by Balfour could be reviewed and those costs could be assessed against the final

adjusted GMP to determine the final amounts due. In this process, as provided by the Contract, Library and Balfour would each have the opportunity to present and pursue their respective claims and disputes in accordance with § 4.3 of the General Conditions of the Contract. (R-7281).

Such matters were not the issue at the time Library failed and refused to make the appropriate progress payments to Balfour. The Master erred by misinterpreting the payment provisions of the Contract, conflating the process and obligations for progress payments versus final payment, and ignoring that Library breached the Contract by failing to make progress payments to Balfour when due. He also erred by misapplying the change order and claims/disputes provisions of the Contract and utterly ignoring relevant and material evidence of Library's liability.

Although Application for Payment No. 43 submitted by Balfour, covering the time period from October 1-31, 2018, was certified for payment by the Architect, Library failed and refused to make the payment to Balfour. 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. (R-23086, Library Ex. 141). Thus, the existing GMP was not a justification for refusing to make the payment due. Furthermore, as expressly reflected on Application 43, Balfour had already identified and given notice to Library and the Architect of 133 RCOs (which would further increase the GMP). (*Id.*). Nonetheless, despite not being paid by Library and Library's failure to address and execute appropriate change orders, Balfour continued to perform under the Contract and to complete the Work. Balfour submitted Applications for Payment Nos. 44-45, but Library refused to process or make any further payments to Balfour despite the fact that the work progressed and the percentage of completion increased.

At the time the progress payments were due, the evidence is uncontroverted that Library had not even asserted or given notice of any claims against Balfour under the Contract in order to justify nonpayment. *See* (R-9032; R-23085, R-23230, R-23430, Library Exs. 141, 142, 143).

Thus, 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. The Record reflects plainly that Balfour was entitled to additional change orders and to compensation for changes.

Throughout the course of the Project, Balfour did as the Contract provided and attached to each Application for Payment a schedule of outstanding and unresolved RCOs, including RCOs dealing with changes in scope, and requesting extensions of time. *See*, e.g. (R-23431, Library Ex. 143). Likewise, these Applications for Payment included a list and description of asserted claims. As provided in the Contract, this schedule was for the purpose of contract administration, so the Architect and Library were on notice of the matters for which Balfour intended to seek compensation. (R-7282, Gen'l Cond., § 4.3.1.2).

In his October 6 Order, the Master reviewed the pending RCOs at issue under the Contract and in the case. (R-129–142). In fact, upon review of the RCOs, 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-130–142). The value of those 25 RCOs which the Master found to constitute valid changes under the Contract was no less than $2,224,486.47. This amount was an amount incurred by Balfour in performing the work under the Contract and would have been added to and have increased the GMP accordingly. Balfour was entitled to payment therefor.

According to the Master, Balfour's failure to follow the terms of the Contract (which the Master used as the basis to deny entitlement and payment to Balfour for at least $2,224,486.47 which he otherwise acknowledged were valid charges for the work performed by Balfour) were things such as: (i) the Architect did not make an initial ruling on the RCOs; (ii) the RCOs are unexecuted; and (iii) the costs of the work included subcontractor costs but the subcontractors

dismissed their separate claims in the litigation and, thus, the subcontractor amounts "could never be costs of the work." However, the Master's reasoning is incorrect as a matter of law and does not justify refusing to require payment for changed work ordered by Library, or of which Library had actual, direct knowledge, or for which the Architect and Library had received notice from Balfour.

First, the Master erred in the interpretation and application of the Contract terms in deciding that Balfour's civil action was defective because it "failed to comply with the conditions precedent of obtaining an initial decision from the Architect prior to commencing the present litigation." In fact, the role of the Architect as initial decision maker under the Contract applies only to the issue of "Claims" as defined by §4.3 of the Contract. It has no application or relevance to the other issues or causes of action in the litigation such as the breach of contract for failure to make progress payments due or the Architect and Library failing to process, execute and pay change orders.

The Architect has a standard contract administration duty and obligation under the Contract to document and prepare change orders when a change in the work has been directed or required. (R-7287, Gen'l Cond., Article 7). The Architect is not functioning as an "initial decision maker" in such circumstances. He is serving his role and discharging his normal duties as an independent licensed professional administering the Contract. (R-7281, Gen'l Cond.§ 4.2.8).

Second, Balfour gave written notice of the RCOs, and claim issues, to the Architect and Library on no less than a monthly basis. As provided by the Contract (R-7282, Gen'l Cond. § 4.3.1.2), beginning in December 2015, each of Balfour's Applications for Payment had attached to it, including expressly as part of each conditional partial waiver and release of lien, a schedule that specifically identified the pending RCOs and Claims for which it was reserving its rights. *See* (R-7393, Balfour Ex. 215). These documents specifically identified the RCOs, and other claims, for which Balfour intended to seek recovery. The RCOs, or claims, identified to the Architect and Library by Balfour as

of the end of the Project, but for which the Architect did not prepare and Library did not execute Change Orders, included:

> RCO's 18, 49R2, 57, 59, 80, 82, 88, 100R2, 102, 103, 106, 112, 115, 118, 122, 123, 129, 130, 131, 132, 134, 136, 140, 141, 143, 144, 146, 148, 150, 151, 152, 153, 154, 156, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 171, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189R1, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 228, 229, 230, 231, 232, 233, 234, 236, 238, 240, 241, 242, 244, 245, 246, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 268, as well as Open and/or Pending Change Orders, Claims, or Delays as identified but not limited to the attached Exhibit "XX" HMS Master Request for Change Order Log dated December 31, 2018.

(R-9053,); (R-6106–6112, Balfour Ex. 11).

The Contract clearly states that, for the purposes of contract administration, Balfour was to provide the above referenced schedule of claims so that Library could rely on the schedule as inclusive of Claims for which Balfour intends to seek compensation. (R-7282, § 4.3.1.2). However, the Master's ruling completely ignores Section 4.3.1.2 and Balfour's compliance with the same. As reflected in those contract provisions, Balfour gave appropriate written notice to Library and the Architect and satisfied the requirements of the Contract Documents.

So there is no doubt that these RCOs were brought to the attention of the Architect for his processing as Change Orders prior to the litigation on March 6, 2019, Balfour accumulated this schedule of RCOs, claims and disputes and submitted them again to the Architect. (R-9033, Balfour Ex. 257). Interestingly, on April 24, 2019, the Architect responded about the RCOs, claims and disputes via email as follows: "The second attachment is my March 15th, 2019 publication of the Certificate of Substantial Completion (with February 15th, 2019 as the date of S/C), **which in effect discharges our Initial Decision Maker duty on the subject of delays**." (R-9045). He otherwise continued in his failure to document and process change orders.

To find, as the Master states, that Balfour's RCOs, claims and disputes can be denied on the basis that Balfour had failed to satisfy a condition precedent to submit those items to the Architect is to ignore the actual terms of the Contract and the facts in the Record. Clearly, Balfour submitted the RCOs, as well as the other claims and disputes, to the Architect in accordance with the notice requirements of the Contract. The Architect simply refused to prepare change orders or to in any other way make a decision on the claims and disputes. Since the Architect made it clear that he had discharged his responsibilities under the Contract as of April 24, 2019, the Master's finding that "the Architect did not and could not render an initial decision on the 'final claim'" is erroneous. The Architect had already abdicated his role and declared his responsibilities under the Contract "discharged." (R-122); (R-9045).

Finally, it is critical to recognize that Article 15 of the Contract and Article 4 of the Contract's General Conditions (AIA Document A201-2007) provide: "If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines." (R-7284, R-7309, Gen'l Cond. §§ 4.4.8 & 15.2.8).

Third, while the Master's Order attempts to elevate form over substance with regard to the processing and handling of Balfour's RCOs, claims and disputes, the well-established law in South Carolina makes clear that where an owner knows of a claim, the failure of a contractor to follow exact contractual provisions regarding the claim is excused. In *Lazer Const. Co. v. Long*, 296 S.C. 127, 130, 370 S.E.2d 900, 902 (Ct. App. 1988), a contractor sued an owner for the balance due under a Guaranteed Maximum Price construction contract. *Id.* The contract stated that in the absence of a signed written change order, the owner would only pay direct costs exceeding the guaranteed maximum costs. *Id.* at 128–29, 370 S.E.2d at 901. The owner argued that the contractor should forfeit all compensation for costs exceeding the guaranteed maximum price for work performed without a written change order per the terms of the contract. *Id.* However, the Court of Appeals

found that "[contractor's] failure to execute change orders for additional work did not necessarily preclude recovery if it could show that [owner] approved the changes." *Id.* The court noted that the owner did not contend the changes were unauthorized, and the contractor presented testimony that owner approved the changes and documentation of the list of "authorized extras." The Court of Appeals held that this evidence supports a finding that the owner approved changes in the project which ultimately increased the costs. *Id.* at 130, 370 S.E.2d at 902. Importantly, the Court of Appeals also upheld the trial court's jury charge "**that where the owner has actual notice of extra work and permits it to proceed without objection, the notice requirement, if any, may be waived**." *Id.* (emphasis added). The Record in this case reflects facts just like those in *Lazer*. Library and the Architect had specific knowledge of the work covered by the RCOs, and accepted such work.

These same principles were later applied by the South Carolina Supreme Court in *Smith-Hunter Const. Co., Inc. v. Hopson,* 365 S.C. 125, 616 S.E.2d 419 (2005). The owners argued that the invoices submitted and relied upon were not "change orders" as contemplated by the contract because they were not signed by both parties and did not set forth the resulting adjustment in contract price and completion date. *Id.* at 129 n.1, 616 S.E.2d at 421 n.1. The South Carolina Supreme Court rejected the owners' argument, stating that the owners "waived those provisions of the contract" when they "**authorized the work done pursuant to the invoices, knew the work was being done, and accepted the benefits of the work**." *Id.* (emphasis added).

As in *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, the evidence reflects that Library had authorized and approved the extra work that was the subject Balfour's claims. R-7349, R-7352, *see* Balfour Exs. 138 & 141 (Balfour's "Owner - Architect Notification Log" denoting instances where Balfour submitted a notice of delay and/or request for increase in contract time or contract sum to

Library); R-7393, Balfour Ex. 215 (Balfour's conditional partial waiver and release of lien forms which were submitted to Library wherein Balfour specifically denoted the claims for which it was reserving its rights per Section 4.3.1.2); R-7336, R-7338, R-7354, Balfour Exs. 72, 81, 143 (formal notices of delay and time and cost impacts provided from Balfour to Library in accordance with § 8.3 of the A201-2007); R-7342, Balfour Ex. 85 (internal project meeting minutes title "Delay Call" wherein Kim Brown informed Mike Bennett that Balfour had sent formal notice of delay to Library); R-7346, Balfour Ex. 111 (email from Library owner's representative to Kim Brown referencing "growing delay claim from [Balfour]"); R-9227, Balfour Ex. 305 (testimony from Library's owner representative that it was undisputable that Balfour was providing delay notifications to Library).

The evidence presented at trial was that Library knew the work was being performed and, in fact, accepted the work for which it now refuses to pay. Examples of such facts and circumstances are reflected in the related Orders by the Master in ruling upon and granting summary judgment on breach of contract claims by certain 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 pursuant to their subcontracts. (R-046–047); (R-019–020); (R-095); (R-034, R-036–037). The work performed by those subcontractors pursuant to their subcontracts with Balfour cannot constitute costs of work for which the subcontractor is entitled to payment but not constitute costs of work for which Balfour is not entitled to payment. These are subcontract cost of work which were not abandoned or dismissed by the subcontractors. Yet, the Master refused to recognize and award those costs for Balfour. Under the clear controlling South Carolina law, Library's actual knowledge of Balfour's RCOs and claims excused claimed non-compliance by Balfour with any other notice requirements or condition precedent in the Contract Documents. The Master's bald finding that he "found nothing to indicate that the condition precedent

was excused by Owner" is not supported by the evidence and was material error. The same findings by the Master with respect to the subcontractor claims and judgments reflects the folly in the Master's position that dismissal of separate litigation claims by subcontractors establishes that such amounts cannot be costs of the work. 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. The Master erred in not awarding Balfour the additional payments it is owed based upon his incorrect interpretation and application of the Contract's terms.

The Master erred in finding that Balfour is not entitled to additional payments because (1) Balfour did not submit a final payment request; (2) Balfour failed to perform a final accounting or properly participate in the auditing process; and (3) Balfour breached the Contract.

1. Final Payment

The erroneous finding by the Master that "Contractor NEVER submitted a final payment request, or the documentation required pursuant to Section 7.2.1 of the AIA 133, prior to commencement of the trial," is based on an error of law arising from an utter misinterpretation of the Contract. (R-127). This litigation involved various issues including Library's failure to make progress payments due, as well as failure to acknowledge and process Change Orders and other "Claims" and "Disputes" within the terms of the Contract. According to the express terms of the Contract, the Change Orders should be processed and executed and once a "Claim" or "Dispute" is resolved it "shall be documented in a Change Order executed by the parties." (R-7282, § 4.3.1.5 of Gen'l Conditions). Only at that time can a final payment request be prepared and submitted. Thus, the Master's purported finding is error and baseless.

This litigation was commenced to determine and resolve the various RCO and Claim entitlement issues, and to establish the final amount due to Balfour for the Work it performed under

its Contract with Library. In truth, the final Application for Payment could not be prepared or presented until those disputes were resolved. *See* (R-5377–5378, 4340:11–4341:6). Therefore, the Master's purported finding that Balfour never submitted a final payment request on the required documentation under § 7.2.1 of the Contract prior to commencement of trial is immaterial to the legitimacy of Balfour's action.

2. **Final Accounting**

Much like the misreliance by the Master on the assertion that Balfour never submitted a final payment request, the Master's finding that Balfour never submitted a final accounting (or the documents referenced in § 7.2.2 of the Contract) is unavailing as an attempt to justify the Master's desired conclusion that Balfour was entitled to no further payments for its work. Until the final Contract scope of work is resolved, based on resolution of the entitlement to the RCOs, as well as the Claims for delays and related damages, the final cost report and accounting for costs based on the applicable adjusted schedule of values and assignment of cost codes cannot be accomplished. To suggest that Balfour's action in the meantime is invalid, misinterprets the Contract, and reflects an error of law.

The finding by the Master that, "due and owing to the Contractor's failure to perform a final accounting for the Project and its repeated obfuscation of the auditing process, Hadley's conclusions are adopted as this Court's findings by the greater weight of the evidence," is, at best, circular. Hadley was a paid witness (auditor) for Library Hadley performed an audit reflected in Balfour's Exhibit 350. In that audit report Hadley admitted that she had and reviewed Balfour's Job Cost Report as of the time of her Report (December 10, 2020) but at that time the RCOs and Claims (including subcontractor claims) had not been resolved. *See* R-9559, Balfour Ex. 350. In fact, Hadley expressly acknowledged and stated, "This report accumulates project costs and identifies those amounts that did not comply with requirements of the GMP contract. This report

does not contain opinions regarding [Balfour's[1]] legal entitlement to the claimed amounts, as it is ultimately the responsibility of the trier of fact to conclude an entitlement." Hadley also stated, "the current GMP has not been modified for any entitlement issues claimed by either party, including increases for additional work performed (i.e., the claims that may result in increases via change orders) and decreases for work not completed . . . ." (R-9571). As discussed above, until the RCO issues under the Contract are resolved, there can be no final cost accounting or audit. Hadley expressly acknowledged these facts and realities. (R-4954, 3917:12–18; R-4966, 3929:9–18). Additionally, Hadley admitted that she was merely hired by Library to perform the cost audit allowed to Library under §7.2.2 of the Contract and she has no role or authority to decide or resolve the outstanding RCO or Claim entitlements. The fact is that the trial process, and Hadley's analysis and testimony, was corrupted when the Master issued the erroneous and unjustified instruction for Hadley to evaluate the "Claims" and to opine on final GMP and project costs. (R-4976–4977, 3939:21–3940:11). The audit provision of the Contract between Balfour and Library, § 7.2.2, pertains to an auditing of the costs incurred by Balfour in performance of the Work. The Contract does not provide for an audit of RCOs or claims in dispute before those matters are resolved. The Contract certainly does not authorize or empower the auditor hired by Library to decide RCO entitlement or scope or to decide disputed Claims.

In this case, the Master conflated those scopes of review and issues which led to the auditor overstepping her role and authority, confusing the issues, and ultimately rendering improper and invalid opinions and conclusions. The Master then compounded the problem, and committed grave

[1] Hadley's Report refers to "Library's legal entitlement to the claimed amount"; however, in the context of her report, it appears that she intended to refer to Balfour's entitlement to the amount it was claiming to be owed pursuant to its claims and the outstanding RCOs.

error, by ceding to the auditor the role of making the ultimate "findings" in this case which he merely adopted.

In fact, in her December 10, 2020 GMP Contract Evaluation report, (R-9558, Balfour Ex. 350), Hadley already specifically stated that her analysis should not reflect opinions regarding legal entitlement to claim amounts because those determinations of entitlement are the sole responsibility of the trier of fact. And, she expressly recognized that the then current GMP had not been modified for any entitlement issues in the claims by the parties, including increases for additional work performed as reflected in pending RCOs and other alleged but yet unresolved disputed claims. (R-9571, Balfour Ex. 350, Sched. B). Hadley's subsequent opinions and testimony on these matters, because the Master improperly told her to undertake such, was improper and the Master's reliance on it was error. (R-4976–4977, 3939:21–3940:11).[2]

3. **Additional Erroneous Breach of Contract Conclusions**

In the October 6 Order, the Master listed fourteen provisions of the Contract that he concluded were breached by Balfour. (R-154). The Master erred in concluding that those purported breaches of the Contract form a justifiable basis for finding in favor of Library on its breach of contract cause of action because: (1) the Master failed to identify any damages caused

[2] Hadley—over Balfour's objection—was permitted to testify to new and previously undisclosed opinions based upon a new scope of review that included her analysis of Balfour's outstanding claims and RCOs. (R-5158–5171, 4121:24 – 4134:8); (R-5131–5133, 4094:22 – 4096:10 (Library's counsel acknowledging that Hadley's testimony included "a lot of intermingling" between the audit of the contract and the cost of the work and the claims and delays that were not a part of the Contract's audit provision)). The Master's decision to allow Hadley to offer new and previously undisclosed testimony was error and such error plainly affected the Master's analysis of the claims at issue in this litigation and his ultimate findings and conclusions. *See Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128, 132–33 (2003); *S. States Rack And Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). As such, the Court should reverse the Master's orders and remand this case for a new trial that does not include the admission of undisclosed expert opinions.

by those purported breaches of the Contract; (2) Balfour's purported breach of those contract provisions was not material; and (3) there is no evidence, and the Master identifies none, in the record to support the legal conclusion that Balfour breached those contract provisions.

First, the Master and the October 6 Order failed to identify any damages caused by these purported breaches of the Contract. To recover for a breach of contract, a plaintiff must prove damages proximately resulting from the breach of the contract. *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 506 (Ct. App. 2012) (stating that to recover for a breach of contract, the plaintiff must prove damages proximately resulting from the breach of the contract).

The Master identified only two items or categories of damages for which he concluded Library may recover due to a breach of contract by Balfour: (1) liquidated damages which he awarded as a result of the delay in the completion of the Project; and (2) actual damages resulting from the costs allegedly incurred by Library in performing corrective or additional work on the Project. However, there is nothing in the Master's Order to support a finding that Balfour's purported breach of any of the following provisions caused any damage to Library: §1.2 (Item 1), §2.1.6 (Item 2); §2.3.1.4, and §3.10 (Item 3); §2.3.2.8 (Item 4); §6.7.2 (Item 5); §6.11.1 (Item 6); §6.11.1 and §7.1.11 (Item 7); §7.1.4 (Item 8); §7.2 (Item 9); §3.3.4 (Item 10); §3.9.1 (Item 11); §3.10.1 (Item 12); and §9.3.1.2 (Item 13). Accordingly, the Master erred in finding Library prevailed on its breach of contract cause of action based on Balfour's purported breach of those provisions identified by the Master.[3]

Next, a party claiming a breach of contract is required to prove the breach was material in order to prevail on a breach of contract cause of action. *Covil Corp. by & through Protopapas v.*

[3] The only provision of the Contract for which a breach of that term may have been the proximate cause of any of the damages awarded to Library is §12.2.1 (item 14). However, as addressed in Argument Section II (B) of this Brief, the Master erred in finding Balfour breached the contract by failing to correct any defective work at its own expense.

Pennsylvania Nat'l Mut. Cas. Ins. Co., No. 2022-000366, 2024 WL 3515523, at *5 (S.C. July 24, 2024). A breach, to be material, must be a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. *See Kelly Cap., LLC v. S & M Brands, Inc.*, 532 F. App'x 422, 432 (4th Cir. 2013) (citing 23 Richard A. Lord, *Williston on Contracts* § 63:3 (4th ed.2007)).[4] The Master erred in finding in Library's favor on its breach of contract cause of action based on the breach of the enumerated provisions listed in the Order because none of those purported breaches were material breaches. For example, § 2.1.6 of the Contract states that Balfour was obligated to make Library an intended third-party beneficiary of "all agreements" between Balfour and its subcontractors on the Project. There is nothing in the Record to establish such a breach (even if it occurred) is material. There is nothing in the Record, and no finding by the Master that such a breach defeated the essential purpose of the Contract or made it impossible for Library to perform its obligations under the Contract. Similarly, the Master also asserts various purported breaches related to accounting and audit requirements. (R-154–155, Items 4, 5, 6, 7, 8, and 9). However, no breach of Contract terms related to any accounting or audit obligations could be considered material, nor were any such breaches identified as the proximate cause of damages to Library. They certainly were not associated with the actual damages found by the Master and awarded to Library pursuant to its breach of contract cause of action.

[4] South Carolina Courts have adopted the following considerations set forth in the Restatement (Second) of Contracts § 241 (Am. L. Inst. 1981) for determining whether a breach of contract is material: (a) the extent to which the injured party will be deprived of a benefit which he reasonably expected; (b) the extent to which the injured party can be compensated for the part of that benefit of which he was deprived; (c) the extent to which the party failing to perform or offering to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure; and (e) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing. *See Covil,* 2024 WL 3515523, at 5.

D. The Master erred in failing to award Balfour additional payments based on an incorrect interpretation and application of the Mechanic's Lien Statute.

The Master erred in concluding that Balfour's mechanic's lien foreclosure action must be dismissed solely based on the incorrect findings that:

1. Balfour failed to perfect its mechanic's liens pursuant to S.C. CODE ANN. § 29-5-90; and

2. the mechanic's liens were excessive and duplicative.

Each of these findings or conclusions by the Master is incorrect and constitutes error. No such finding or conclusion is supported by the facts and is plainly wrong on the law.

A mechanic's lien arises inchoate in favor of each contractor, subcontractor, material supplier and laborer at the moment each of them performs or supplies the labor or materials to the property. S.C. CODE ANN. §§ 29-5-10 and 20; *Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407 (1918); *Shelby Constr. Co., Inc. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E. 2d 488 (Ct. App. 1985); *Lowndes Hill Realty Co. v. Greenville Concrete Co.*, 229 S.C. 619, 93 S.E. 2d 855 (1956).

The contractor or subcontractor merely needs to perfect and enforce the lien according to the applicable statutory requirements. Those requirements are relatively simple: first, the contractor must file and serve the notice of lien no later than 90 days following the last date upon which he performed work, S.C. CODE ANN. § 29-5-90; then, within six (6) months of the last date of work, a suit to foreclose the lien must be commenced, S.C. CODE ANN. § 29-5-120. The Master's erroneous conclusion seemingly is premised upon the utterly incorrect proposition that a mechanic's lien filed while the contractor is continuing to work on the property (prior to ultimate completion of the work or cessation of all work on-site) is untimely and invalid. Such a finding or conclusion is legally wrong and is rank error.

A contractor may file a lien for amounts owed in connection with labor or materials supplied to the property whenever he has performed work within 90 days of the date he files the lien. The timeliness and validity of the lien is not affected by the fact that the contractor is continuing to perform work or to supply additional labor or materials to the property. *See Preferred Savings & Loan Assoc., Inc. v. Royal Garden Resort, Inc.* 301 S.C. 1, 389 S.E. 2d 853 (1990); *Wood v. Hardy,* 235 S.C. 131, 110 S.E. 2d 157 (1959). Section 29-5-10 merely requires that the labor in the statement of lien has already been performed and no more than 90 days has passed before the filing of the lien. *Id.*

There is no prohibition against filing a lien even while the contractor is continuing to provide additional labor or materials on the job. This situation was addressed in *Cianbro Corp. v. Jeffcoat & Martin*, 804 F.Supp. 784 (D.S.C. 1992), *aff'd*, 10 F.3d 806 (4th Cir. 1993). As established by *Cianbro*, the only modification of the usual requirements for perfecting the mechanic's lien, if it is filed prior to the date when the contractor actually supplies the last of its labor and materials on the job, is that in such a circumstance the suit to foreclose the lien must be commenced within six (6) months of the date the lien was filed—regardless of the actual last date the contractor provided labor or material to the job.

1. **Balfour timely filed and perfected both its original and amended January 25, 2019, mechanic's liens.**

On January 25, 2019, Balfour filed a Notice and Certificate of Mechanic's Lien in the amount of $8,409,658.54. (R-15739). This Notice and Certificate of Lien reflected the amount Library owed to Balfour for work performed on the Project up until that date, even though other work was still ongoing. *See id.* ("The undersigned Petitioner has furnished, within ninety (90) days of the date hereof, labor, services and materials . . . ."). In other words, the labor and material contemplated in Balfour's notice and certificate of lien was furnished prior to and up until the

notice and certificate of lien was filed on January 25, 2019. *See Preferred Sav.*, 301 S.C. at 4, 389 S.E.2d at 854 ("The clear meaning of [section 29-5-90] is that ***the labor contemplated in the filed statement*** has already been performed within 90 days prior to the filing.") (emphasis added). On March 5, 2019, well within six months of the lien filing date of January 25, 2019, Balfour timely commenced its action to enforce and foreclose its mechanic's lien, and it filed the appropriate notice of *lis pendens*. *See* S.C. CODE ANN. § 29-5-90; 29-5-120. These filings were timely and proper in accordance with § 29-5-90 and § 29-5-120.

Similarly, Balfour perfected its amended mechanic's lien filed July 23, 2019 when it obtained a Court Order granting leave to amend its pleadings and to file an amended Summons and Complaint to foreclose the amended lien, and Balfour then filed and served the Amended Complaint to foreclose the amended Mechanic's Lien on October 3, 2019, within six months of the actual last day of work on April 26, 2019.[5] Thus, Balfour timely and properly perfected both its original and amended mechanic's liens. The Master's findings or conclusions to the contrary are clear error.

2. **The mechanic's liens filed by Balfour were not improperly excessive or duplicative.**

As described above, Balfour and each of its subcontractors, material suppliers and laborers are imbued with separate mechanic's lien rights. Not surprisingly, and certainly not improperly, if an owner does not make payment for work performed (labor and material supplied) at a project,

[5] After the filing of the original lien, Balfour continued to work and to provide labor and material to the Hotel Project. Balfour ceased furnishing labor on the Project on April 26, 2019, (R-119,). It then filed and served an Amended Notice and Certificate of Mechanic's Lien on July 23, 2019 (in the amount of $12,066,147.07). This filing was within 90 days of the last date of work by Balfour on April 26, 2019. (R-7383, Balfour Ex. 201). Balfour was required to file its Amended Summons and Complaint within 90 days of July 23, 2019. *See Preferred Sav.*, 301 S.C. at 5 n.1, 389 S.E.2d at 855 n.1. The Amended Complaint was filed on October 3, 2019, which was 72 days after July 23, 2019, and was within the time allowed by the statute.

the general contractor, subcontractor, material supplier and laborer involved in performing that work and supplying the labor and material each has the legal and statutory right to file its lien.

Because subcontractors supply their labor and materials to the job through the general contractor, it is not surprising or improper that the lien amounts asserted by subcontractors will also be in the lien amount asserted by the general contractor. In this way, it is inherent the lien amounts of the general contractor and of the subcontractors will likely be overlapping. Thus, it is clearly within the ambit of the mechanic's lien statute that the total amount of all liens may overlap (the total cumulative amount of all liens will be higher than the actual, final aggregate debt).

In part, this is the reason that when an action is commenced to foreclose any lien, all liens will be foreclosed in the same action. At that time, proper allocations can be made, and duplication of the amounts owed will be sorted out and eliminated. However, the various liens filed are not improper or excessive based on the subcontractor lien amount amounts also being included in the general contractor's lien amount.

The record demonstrates that Balfour filed a lien for the amount it believed, in good faith, it was owed under the Contract. That lien amount can properly include the amounts for work performed by its subcontractors through it. The lien amount may also include all amounts included in the Contract Price or reflected in the value of the labor or materials furnished. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp*., 287 S.C. 346, 352, 338 S.E.2d 631, 634–35 (1985) (citation omitted); *see also Zepsa Construction, Inc. v. Randazzo*, 357 S.C. 32, 38, 591 S.E.2d 29, 32 (Ct. App. 2004).

At trial, David Simonton (the Balfour witness) testified that the amount of Balfour's January 25, 2019, mechanic's lien ($8,409,658.54) was determined by him, Nick Starcevic, and Casey Thompson using Balfour's financials. (R-3266–3267, 2232:18–2233:12). The amount included what Balfour was owed and what labor, materials and bills had been received from

subcontractors up to that point. (*Id*.). Mr. Simonton further testified that Balfour's amended mechanic's lien, in the amount of $12,066,147.09, was comprised of "the contract balance, RCOs, executed and unexecuted, overages of general conditions, change orders … [and] executed OCOs not funded." (R-3266–3358, 2323:2–2324:1). Costs associated with delay claims were also included to the extent that they were provided for in the Contract and necessarily incurred in performance of the contract work. (R-3358, 2324:2–6).

There is no evidence in the record, and there was no testimony, that Balfour inflated the amounts claimed in the lien. While the parties may disagree as to the amount Balfour was ultimately entitled to recover on its mechanic lien claim, that is not evidence, and forms no basis, for the Master to conclude the lien claim was excessive and improper. Rather, the evidence shows only that Balfour "was simply trying to get paid according to its understanding, albeit disputed, of the contract." *See Coker's Mobile Home Plaza, Inc. v. ITT Com. Fin. Corp.*, 900 F.2d 250 (4th Cir. 1990) (citing *Smith v. Canal Ins. Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980)) (finding plaintiff failed to prove fraudulent act element of claim for breach of contract accompanied by fraudulent act). In truth, the Master never made the required analysis of the lien claim because he dismissed the claim out-of-hand relying on an utterly incorrect and baseless legal conclusion that the lien had never been perfected. The analysis of the Balfour mechanic's lien claim must be remanded for proper consideration and determination.

II. THE MASTER ERRED IN FINDING AND CONCLUDING THAT THE EVIDENCE ESTABLISHED A BREACH OF CONTRACT BY BALFOUR AND THAT LIBRARY HAD ESTABLISHED RECOVERABLE DAMAGES FOR SUCH A BREACH IN THE AMOUNT OF $3,320,329.

A. The evidence did not establish that Library was entitled to recover $1,483,000 in delay liquidated damages from Balfour.

Library's claim to recover $1,483,000 in delay liquidated damages is just that: a "Claim" under §4.3 of the General Conditions of the Contract. Library had the burden of establishing that

it satisfied all the "Claim" requirements of the Contract, and the burden of proof in establishing Balfour's liability for compensable delay. Library failed on all counts. Under the law, there are various types of delay. Delays can be excusable; they can be compensable or non-compensable; and they can be concurrent (one delay occurring at the same time as other independent delays). Importantly, any actionable delay must be one occurring on the critical path of the work on the project. (Balfour Ex. 56, A133; §5.3.1); *G.M. Shupe, Inc. v. U.S.*, 5 Cl. Ct. 662, 728 (1984); *see also Youngdale & Sons Const. Co. v. U.S.*, 27 Fed. Cl. 516, 550 (1993) ("[T]he proof must show that a delay item or activity *must* be on the critical path in order for that particular delay to impact the completion of the project."); *Mega Const. Co. v. U.S.*, 29 Fed. Cl. 396, 424–25 (1993) ("It is not enough that an activity is delayed: there must be delay of an activity on the critical path for there to be project, or compensable, delay."). If it is determined that a delay along the critical path of the work occurred, determining who caused or contributed to the delay, and the type of delay (excusable, compensable or concurrent) is necessary to determine what relief, if any, is due to one party or another.

In this case, Library never presented material or competent evidence, and the Master never performed the proper and necessary analysis of delay on the Project, to justify the conclusion that Library was entitled to the relief and damages (liquidated damages) he awarded it for delay. The Master misapplied the law and reached a conclusion for which there was no competent evidence to support it.

1. **Library failed to meet its burden of proving delay for which it is entitled to an award of delay damages.**

"The party claiming damages for delay must prove that the delay was the fault of the party against whom the damages are sought." *Structural Sales, Inc. v. Vavrus*, 132 Ill. App. 3d 718, 721, 477 N.E.2d 745, 748 (1985). Because only delays to the critical path of the work justify any award

of delay damages, the law recognizes that a proper critical path analysis by a qualified expert is necessary to prove entitlement to delay damages. *See Mega Const. Co.*, 29 Fed. Cl. at 433 ("In the absence of proof of critical path analysis, it is impossible to determine if some activities could have been scheduled earlier, but for delay attributable to defendant.").

At trial, Library presented no competent evidence of any critical path method analysis upon which to base a conclusion that Balfour caused or contributed to compensable critical path delay on the project—let alone how much delay Balfour caused. At trial, Library's only proof of the alleged delay to justify an assessment of liquidated damages was simply its contention that the adjusted contract completion date was August 19, 2017, and the date of substantial completion of the Work was February 15, 2019. Library asserted, therefore, it was entitled to the contractual liquidated damage rate for every day in between. Such proof is inadequate and cannot form a proper basis for the Master's assessment and award of delay liquidated damages to Library.

At trial, there were three purported expert witnesses who testified about schedule analysis and delay on the Project. Balfour offered the testimony of Mark Doran who was qualified by the Master as an expert in scheduling and delay analysis. (R-1748–1749, 714:16 – 715:2). Doran testified to having performed a critical path method analysis of Project delays. (R-1757–1849, 723:16–815:13). Library offered the testimony of Mark Boe and Grady Query who were qualified by the Master as experts in the fields of scheduling and delay claims. (R-3642-3643, 2608:24 - 2609:3; R-3983, 2949:21–24). However, the Record reflects that Boe and Query each expressly admitted that they never even attempted to perform a critical path method analysis of the possible delays on the Project. (R-3906, 2872:3–17; R-4095, 3058:20–24; R-4096-4098, 3059:25 – 3061:4). Moreover, both Boe and Query admitted that the facts and evidence established that there were likely multiple causes of delay, including causes for which Library was responsible. (R-3928, 2894:15–19, R-3665, 2631:3–9).

After acknowledging he did no critical path method analysis of the schedules or delays, Library's purported expert admitted the fundamental need for such analysis. He said: "[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." (R-3665, 2631:3–9). However, neither he, nor any witness for Library, performed such a delay analysis for the project. (R-3646, 2612:13–15; R-9238–9239, 37:7–38: 12; R-4095, 3058:20–24). Bottom line, Library failed to offer competent evidence or testimony as to what items were on the critical path, how many days of critical path delay occurred, and who is responsible for each of those critical path delays. Despite admitting that there were multiple causes of delay on the Project, Library offered no proof as to the extent or duration of each such delay and no evidence to allocate the overall delay among the various causes—whether committed by Library, Balfour, or other causes outside the control of either. Library offered no evidence to address or separate the existence of concurrent causes of delay, despite the fact that in the face of concurrent causes of delay no party contributing to such delay may recover damages therefor.

In essence, Library offered no evidence regarding who delayed the project, how long those delays occurred, whether those delays were excusable or not, compensable or not, or concurrent. While Balfour's expert offered the only evidence on such issues, the Master simply chose to disregard it. He purports 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*, 208 S.C. at 39, 36 S.E.2d at 860. Nonetheless, the Master awarded Library delay liquidated damages and his findings and conclusions in this regard are clear error.

2. Library's admissions of delay prevent an assessment of liquidated damages.

The Master erred in finding that Library was entitled to $1,483,090.00 in liquidated damages because Library admitted at trial that it was responsible for at least some portion of the overall delay. When there are concurrent delays that are not properly apportioned with specificity, none of the parties responsible for the concurrent delays may recover compensation for such delays. *PCL Const. Servs., Inc. v. U.S.*, 53 Fed. Cl. 479, 487 (2002).

PCL Const. Servs., 53 Fed. Cl. at 481, was a payment dispute between a contractor and the U.S. Government including the government's assessment of liquidated damages. At trial, an expert witness for the government conceded that the government contributed to the delay to the project. *Id.* at 488. Fact witnesses also admitted that there was hinderance by the government, that "the government's response to RFIs was not as fast as [the contractor] requested," and that "[the contractor's] contract completion was delayed, to some extent, by government-directed changes." *Id*. at 487. Finally, the Court noted that the government's expert "failed to analyze exactly how many days of delay were caused because of [the government], how many days were caused by [the contractor], and how many days were concurrent." *Id.* at 491. As a result, the Court refused to compensate the government for the alleged damages and denied the government's delay liquidated damage claim.

On review, the Court of Federal Claims recognized the rule that: "When performance of the contract is delayed by [an owner] and the contractor, 'the rule of original contract cannot be insisted upon, and liquidated damages measured thereby are waived.'" *Id.* (citing *U.S. v. United Eng'g & Constr. Co.*, 234 U.S. 236 (1914). The Court did acknowledge the "rule of apportionment" which allows the apportionment of delay damages where there "is in the proof a clear apportionment of the delay and the expenses attributable to each party." *Id.* (citing *Sauer Inc.*

v. Danzig, 244 F.3d 1340 (Fed. Cir. 2000)); however, the Court concluded that "under an analysis of either rule, the government is not entitled to liquidated damages." Such conclusion was based on review of expert testimony, which the court held failed to "clearly apportion all of the delay," and upon the Record which reflected the government's concession that it contributed to the delay. *Id.* at 490–92. When there is evidence of delay by both parties, the liquidated damages clause of the contract should be annulled. *Id*. at 485.

The facts of *PCL Construction*, and the Court of Federal Claims' reasoning, are directly instructive and applicable to this case. Like the government's expert in *PCL*, at trial Library's scheduling expert, Mark Boe, admitted that Library was responsible for delays to the Project. (R-3928, 2894:15–19). As with the government in *PCL*, Library failed to timely respond to RFIs as provided for in the Contract, *see* (R-6092, Balfour Ex. 3 (RFI compilation showing that 439 responses to RFIs were late)), and Library's issuance of changes contributed immensely to the delay on the Project. *See*, *e.g.*, (R-7340, Balfour Ex. 83 (email from Library's owner representative to Kim Brown stating, "Chaos has ruled," and further acknowledging that Library and the construction of the Project would benefit from a design freeze)). Notably, Library (Michael Bennett) *admitted* that Library knew it had caused issues at the project. (R-9148, Balfour Ex. 301, R-1685, 651:18–25). Finally, Library failed to provide *any* delay analysis, and so any apportionment of liquidated damages is inappropriate.

As noted above, Library offered no analysis regarding who caused various delays on the project, or how long each delay lasted or whether those delays were excusable or not, or compensable or not. Thus, the Master's finding that Balfour is liable to Library for all delay on the Project and that Library is entitled to recover delay liquidated damages for each day of delay is clear error.

3. **Library waived, or is estopped from enforcing, its right to assess liquidated damages.**

An owner's contention or assertion that it is entitled to an assessment of liquidated damages for delay against the contractor is nothing more than a claim under the contract. The General Conditions to the construction contract between Library and Balfour (AIA Document A201-2007), Section 4.3.1, clearly defines a "claim" as "a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. (R-7282). The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." (*Id.*). This section of the Contract goes further to provide that "Claims must be initiated by written notice." (*Id.*). "The responsibility to substantiate Claims shall rest with the party making the Claim." (*Id.*).

An assertion by Library that it is entitled to an assessment of $1,483,090 for delay liquidated damages is undeniably a "Claim" under this term of the Contract. Thus, a "Claim" for the assessment of liquidated damages is subject to the other provisions of Section 4.3 of the General Conditions to the construction contract. (*Id.*). Namely, this means that the "Claim" was required "to be in writing and shall reasonably identify the Claim, and to the extent reasonably possible, the grounds thereof and the relief sought." (*Id.*, § 4.3.1.1). Furthermore, in accordance with § 4.3.2 of the General Conditions of the Contract, "Claims by either party must be initiated within 30 days after occurrence of the event giving rise to such Claim or within 30 days after the Claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party." (*Id.*).

Of course, review of the Master's Order reveals his attempt to strictly enforce such notice provisions with respect to any potential "Claim" by Balfour, while deliberately ignoring the very same requirements as they pertain to the "Claims" by the Owner. Neither Library, nor the Master, may have it both ways.

The Record does not reveal, and the Master does not describe, that Library in any way satisfied the requirements for a "Claim" for the assessment of delay liquidated damages in accordance with Section 4.3 of the General Conditions of the Contract. (R-7281). No claim under the Contract was ever made by Library for delays, and no formal allegation of delays was made until Library counterclaimed in this litigation for delay damages. The testimony of Library representative Kim Brown was that it was not until February 2019, that Library told Balfour, orally or in writing, that Balfour might be responsible for delay damages. (R-4872, 3835:8–12). This mention of delays by Library was not in a required claim, but simply in a letter. *See* (R-9031, Balfour Ex. 255). Ms. Brown testified that she did not advise Balfour because she did not think she was obligated to do so. (R-4874, 3837:18–22). Brown admitted that she understood that Library had the right to make a claim against Balfour beginning on August 19, 2017, when the original completion date was not met. (R-9139–9140, 207:21 – 208:15). Indeed, Library representative Jim Clements testified that he knew that if Library had asserted a claim for liquidated damages in July/August of 2017, the issue would have been addressed then or Balfour would have stopped work. (R-9285, 297:4–22). Balfour representative David Simonton testified that Balfour would not have continued work if Library had asserted delay claims in July/August of 2017, unless they had been resolved. (R-3011–3013, 1977:3 – 1979:17).

Despite the facts and the record, the Master erroneously found that there was no evidence in this case that Library intentionally waived any rights. This finding completely contradicts the undisputed evidence and the law. When Library alleges the completion of the Project was 545 days late, it is not possible that such delay was not apparent to Library well before the date of actual completion. (R-9123, 226:3 – 227:2). Since Library never invoked the liquidated damage provision until after completion, the only reasonable inference is that it voluntarily and intentionally waived its delay claim. This conclusion is supported by other evidence in the case as well. Specifically,

even after the established Contract completion deadline had passed, Library continued to order changes in the Work. (R-9000, Balfour Ex. 231 (Mark Doran delay analysis establishing that over 46 construction change directives were issued to Balfour after the contractual completion date of August 19, 2017)); (R-1803–1804, 769:8–770:18 (Library failed to account for a front desk at the hotel until March 2018)); (R-1804, 770:20–25 (Library did not select finishes for the interior of the elevators until June 2018)). Under recognized legal authority, where an owner directs the performance of the work, as to make it impossible for the contractor to have completed such work within the contract period, the legal presumption is that the parties intended that the contractor was to be given a reasonable time within which to perform the extra work regardless of the date fixed for completion of the entire contract. In other words, the law is that the contract completion date is automatically extended by the amount of time required to perform the extra or changed work. *Acting Comptroller Gen. Weitzel to the Sec'y of the Army*, 34 Comp. Gen. 230, 234–35 (Nov. 18, 1954); *see also U.S. Pipeline, Inc. v. N. Nat. Gas Co.*, 930 N.W.2d 460, 480–81 (Neb. 2019).

In *U.S. Pipeline*, because of extra work orders by the owner, and other reasons, the project was not substantially completed by the contract deadline. *Id*. The owner withheld liquidated damages. *Id*. However, the trial court found the owner waived is rights to withhold liquidated damages because the owner (1) failed to indicate the liquidated damages clause would be enforced after requesting extra work, and (2) continued to issue changes after the original substantial completion date. *Id*. at 461. The Nebraska Supreme Court affirmed the trial court's finding of waiver, holding that "[a] contractual provision for liquidated damages for delay in performance may be waived." *Id*. at 474. The Nebraska Court emphasized that by "**requesting the Extra Work, submitting designs after passing of the substantial completion date, and further failing to inform [the contractor] that it intended to enforce the liquidated damages provision in the**

contract, [the owner] manifested a clear intent to waive the contractual liquidated damages provision." *Id*. at 475 (emphasis added).

The Master's refusal to find that Library waived its right to assess liquidated damages under nearly identical facts in this case is erroneous. It is unquestioned, and undisputed, that Library made numerous changes to the design and required Balfour to perform additional work after the contractual completion date had passed. *See* testimony from Library's scheduling expert Mark Boe *supra*; (R-9000, Balfour Ex. 231 (Mark Doran delay analysis establishing that over 46 construction change directives were issued to Balfour after the contractual completion date of August 19, 2017)); (R-1803–1804, 769:8–770:18 (Library failed to account for a front desk at the hotel until March 2018)); (R-1804, 770:20–25 (Library did not select finishes for the interior of the elevators until June 2018)). Finally, Library intentionally did not inform Balfour that it intended to enforce the liquidated damages provision after requesting Balfour perform extra work. (R-9139–9140, 207:21–208:15).

South Carolina law is clear that an owner's actions may waive provisions in a contract. *Smith-Hunter Const. Co. v. Hopson*, 365 S.C. 125, 129 n.1, 616 S.E.2d 419, 421 n.1 (2005). In *Hopson*, a contractor relied on invoices to establish the costs of the work. *Id.*, 365 S.C. at 129, 616 S.E.2d at 421. The owners argued that the invoices were not "change orders" as contemplated by the contract because they were not signed by both parties and did not set forth the resulting adjustment in contract price and completion date. *Id.*, 365 S.C. at 129 n.1, 616 S.E.2d at 421 n.1. The South Carolina Supreme Court rejected the owners' argument, stating that the owners "waived those provisions of the contract" when they "authorized the work done pursuant to the invoices, knew the work was being done, and accepted the benefits of the work." *Id.*

The undisputed evidence leads to only one conclusion—Library directed Balfour to perform extra work, accepted the benefits of Balfour's extra work and, therefore, pursuant to

controlling South Carolina law, Library waived its right to assess liquidated damages and to require strict compliance with the Contract. The Master's finding that Balfour was required to finish the Project by the contractual completion date, while Balfour was simultaneously performing owner directed changes and performing owner directed additional work not contemplated by the Contract, is clear error.

As with waiver, an owner who issues changes after the contractual completion date and is silent on its intention to enforce liquidated damages after the passing of the contractual completion date, is equitably estopped from enforcing a liquidated damages clause. *Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 222 A.3d 613, 1100 (ME. 2019). In *Lewiston*, the contract contained a date by which each building was to be substantially complete, and a liquidated damage clause that entitled the owner to recover at a specific rate if the buildings were not complete by those dates. *Id.* at 616. None of the buildings were substantially complete by the original completion date and, as delays rose throughout construction, the contractor sent various notices to the owner of those delays and updated the schedules with dates that indicated construction would not be completed by the substantial completion date. *Id*. The Court noted that "even after the contracted substantial completion dates had passed" the owner issued dozens of change orders for the projects, which expanded the scope of the contractor's work. *Id.* at 616. As a result of the owner's silence, the contractor believed that the owner would not assess liquidated damages and continued its work, even though the owner stopped making progress payments near the end of the job. *Id.* at 617. Based on this same belief, the contractor did not insist that the owner issue a change order extending the contractual completion date as the delay arose. *Id.* Finally, the Court recognized a statement from the owner that the outstanding request for time extensions would be addressed after the project was complete. *Id.*

On appeal, the owner argued that equitable estoppel could not be applied absent evidence that the owner explicitly told the contractor that liquidated damages would not be assessed. *Id.* at 620. The Maine Supreme Court disagreed, stating that the owner's actions "amounted to misrepresentations about its intent to assess liquidated damages" and affirmed the determination that equitable estoppel barred the owner's liquidated damages claim. *Id.*

Lewiston is instructive and applicable to this case. The overwhelming evidence at trial was that Balfour sent notices of delay to Library, updated the schedule a number of times to reflect that construction would not be completed until after the contractual completion date, and that Library issued change after change to Balfour after the contractual completion date had passed. (R-7090, 7337, 7338, 7354, 9001; Balfour Exs. 26, 72, 81, 143, and 231). In spite of this, Library *intentionally* concealed its intention to assess liquidated damages against Balfour. (R-9139–9140, 207:21 – 208:15). In fact, Library performed schedule audits during construction that it withheld from Balfour as "attorney client privileged information prepared in anticipation of litigation" so that Balfour would continue to perform work on the Project. (R-9283, 292:5–12; R-9139–9140, 207:21–208:15). Importantly, Michael Bennett (Library) specifically said that he knew there were a number of outstanding change orders at the Project and when the dust settled he would take care of everything. (R-1685–1686, 651:1–652:3). As a result of Library's actions, or inactions, Balfour continued working at the Project when it otherwise would have stopped if it knew liquidated damages would be assessed. (R-9285, 297:4–22; R-3011-3013, 1977:3 – 1979:17).

Under South Carolina law, "[e]quitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017).

> Elements of equitable estoppel as to the party estopped are: (1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and

> (3) knowledge, actual or constructive, of the true facts. Elements of estoppel as to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position.

Mac Papers, Inc. v. Genesis Press, Inc., 426 S.C. 393, 403–04, 826 S.E.2d 874, 880 (Ct. App. 2019). The evidence clearly shows that Balfour met its burden of proving equitable estoppel and the only conclusion is that the Master committed clear error in not ruling that Library was estopped from assessing liquidated damages against Balfour.

B. The evidence did not establish that Balfour had failed to complete the work as required under the Contract Documents or that Library was entitled to recover $2,256,764 in what the Master improperly labeled "Cost to Complete" damages.

A major component of the so-called damages awarded by the Master to Library was $2,256,764 in what the Master sought to characterize as "cost to complete" damages. (R-155). It is an utter mischaracterization by the Master to label these as "cost to complete" damages. In truth, these "damages" arise from the unilateral and improper rejection by Library of work already performed and completed by Balfour. Library's purported "costs to complete" are Library's costs incurred in changing and reperforming some of Balfour's work after it explicitly accepted it and according to specifications and standards materially different from those required under the Contract.

The Master's October 6, 2023, Order includes the following findings:

> Owner put Contractor on notice of the defective work. Owner then performed the work through other contractors. Owner incurred costs performing work or self-performing work that Contractor was contractually required to perform, but Contractor either failed to perform the work or the work was defective and no it not in compliance with the Contract Documents. This work included warranty work, laundry costs, labor, cleaning fees, repair work, painting work, punch list repair work, fixtures, and pool repairs. Defendant's Exhibit 146B contains proper and complete supporting documentation. The total amount of the Owner supplied work is $2,256,764.00.

The $2,256,764.00 the Master awarded to Library includes $1,788,724 related to costs allegedly incurred by Library in connection with repainting the guestrooms at the Hotel. (R-23570, Library Ex. 146B). The Master's finding that Library was entitled to recover these painting costs was clear error because: (1) Library failed to carry its burden of proving Balfour's work was defective; and (2) Library never made a prior claim or issued a change order for the repainting costs.

1. Library failed to carry its burden of proof on entitlement damages for defective or nonconforming work.

In reaching its conclusion that Library was entitled to damages, the Master ignored the plain language of Section 12.2.1 of the Contract, which states:

> The Contractor ***shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents***.…

(R-7303). In order to be entitled to the repainting and repair costs at issue, Library was required to prove that the repaired work (1) failed to conform to the requirements of the Contract Documents and (2) was rejected by the Architect. The clear and undisputed testimony at trial, is that (1) Balfour's work was approved, *multiple times*, by the Architect, and (2) the work complied with the Contract Documents. (R-7357, 7363, and 9350, Balfour Exs. 150, 151 and 312; *see also* R-2900–2902, 1866:15 – 1868:21; R-2904–2906, 1870:6 – 1872:19). There was no evidence that the work failed to conform to the Contract requirements or that it was rejected by the Architect.

The Contract Documents required the guestroom walls be constructed to a Level 4 finish. (R-1195–1198, 161:13–164:20, R-2883–2885, 1849:21–1851:10, R-3795, 2761:20–24). The Contract Documents also required the guestrooms to have an eggshell paint finish. (R-2962, 1928:15–23). Therefore, in order to prove entitlement to its refinishing and repainting costs, Library was required to prove that guestroom drywall and painting performed by Balfour was not

equal to a Level 4 finish, was not an eggshell paint finish, was not in compliance with the Contract Documents, and was rejected by the Architect. (R-7303, § 12.2.2.1).

Library totally failed to satisfy this burden of proof. In fact, the evidence at trial was clear that the drywall finish installed by Balfour was a Level 4 finish. (R-7372, Balfour Ex. 154 (email from project architect Jennifer Faulkinberry to Balfour employee Nick Starcevic discussing the sheetrock as a L4 finish)). The evidence at trial is also undisputed that the paint applied by Balfour was an eggshell finish. (R-4292, 3255:8 (wherein Library's Owner Representative for the project testified that "…[T]hese rooms had an eggshell finish…")).

Finally, the overwhelming evidence admitted at trial was that the Architect not only failed to reject, but explicitly approved Balfour's work in the guestrooms. (R-9350, Balfour Ex. 312 (letter from Library's Owner Representative to hotel operator stating "…the guest rooms are complete and available for turnover to Library Associates and Salamander now… The following link will take you to the punch list signed off by the [Architect of Record].")); (R-9213, Balfour Ex. 303, Dep. of J. Faulkinberry, at 95:2–5 (testimony from the project architect that she was prepared to issue a certificate of substantial completion for the guestrooms)).

The Contract only required Balfour to remedy, or be liable for the costs to remedy, defective work that was "rejected by the Architect." (R-7303, § 12.2.1). The Architect did not reject the room wall finishes or painting. The *only* reason Library repainted the guestrooms was that Michael Bennett decided unilaterally that he did not like the finish that his architect specified. (R-9226, Balfour Ex. 304, Dep. of W. Faust, at 66:16–67:1 (testimony from the Hotel Bennett interior designer that the decision to repaint the guestrooms was strictly a decision on the owner's part because they did not like the specified finish)).

Michael Bennett's preference for a different type of paint and sheetrock finish from that specified in the Contract does not serve as a basis for Library to recover its refinishing and

repainting costs. The Master committed error in awarding those costs to Library. In fact, the only evidence offered by Library to prove entitlement to its repainting claim were two photographs of the same location that show screw holes in a wall where a mirror, which was missing at the time of the photograph, had been removed. (R-4495, 3458:14–24). No testimony was introduced to establish that the work in the photos was defective or was caused by Balfour.

The issue of whether the rooms were at a Level 4 finish, or if they had an eggshell paint finish as specified, are issues amenable only to specialized expertise. The Master had no basis for evaluating the issue or the evidence otherwise. Thus, to carry its burden of proof, Library was required to admit properly qualified expert testimony on the subject. It did not. Therefore, Library failed to carry its burden and the Master erred in finding in Library's favor on the issues. Without expert testimony, no competent evidence was introduced to establish, or for the Master to base a legitimate finding that the work performed by Balfour was defective or nonconforming. Determining whether the walls were not finished in accordance with the specifications is not a matter of common knowledge and, therefore, Library was required to introduce expert testimony to prove that Balfour's work was defective. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) ("The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required."). Since Library introduced no such testimony it did not carry its burden of proof on this issue, and the Master's finding to the contrary are error.

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* (R-5318–5320, 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, *see*

(R-5320–5324, 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* (R-5324–5327, 4287:16–4290:18); and (4) Library's claim for replacement of bathroom chandelier crystals in the amount of $54,062 was not attributable to Balfour, *see* (R-5327–5329, 4290:19 – 4292:12).

Under South Carolina law, Library bears the burden of establishing Balfour's breach of this provision of the Contract by the preponderance of the evidence. *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Library failed to prove that Balfour breached its contract and further failed to establish that Balfour caused or that Library was entitled to recover the repainting costs, or any other claimed damages for what it maintains was incomplete or defective work. The Master had no competent evidence to support or justify his findings and conclusions and the Court must reverse the Master's decision to award such damages to Library.

2. Library did not make a claim or issue a Change Order for any defective or nonconforming work.

The Master awarded Library the repainting costs based on Section 2.4 of the Contract. (R-7272). That section, entitled "OWNERS RIGHT TO CARRY OUT WORK", reads as follows:

> If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a three-day period. If the Contractor within such three-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. ***In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the reasonable cost of correcting such deficiencies***.…

(R-7272)(emphasis added). According to the Master, "Article 7 of the AIA-A201 provides that the Contract Sum and Contract Time can only be adjusted by Change Order, Construction Change

Directive or minor changes by Architect." (R-129). Library *never* gave the required notices or issued a proper change order to Balfour for the repainting or other repair costs as required by Section 2.4. Based upon the Master's own Order, the repainting costs, or any repair costs, cannot and shall not be awarded to Library without such required notices or the valid change order.

The Master's criticism of Balfour for not strictly complying with Contract notice requirements, conditions or technicalities cannot be reconciled or justified with his repeated refusal to apply and enforce such requirements and conditions to the conduct and claims by Library. Under the Master's interpretation of Section 4.3.2 of the Contract, when applying it to Balfour, all claims for change orders must be submitted within thirty days after the events giving rise to such claim. (R-131). Since Library never made a claim for a back charge or change order related to the repainting or repair costs, under the Master's own analysis, the award of these damages to Library is error.

III. THE MASTER ERRED IN FINDING THAT LIBRARY (OR THE EVIDENCE) ESTABLISHED A BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT BY BALFOUR.

The Master erred in finding in Library's favor on its cause of action for breach of contract accompanied by a fraudulent act because (1) the Master identified no fraudulent act committed by Balfour accompanying the purported breach of the Contract; and (2) the Master made no finding that Library changed its position because of any fraudulent act committed by Balfour that was related to the purported breach of the Contract.

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); *Osborn v. Univ. Med. Assocs. Of Med. Univ. of S.C.*, 278 F.Supp. 2d 720, 740 (D.S.C. 2003) (citing

Vann v. Nationwide Ins. Co., 257 S.C. 217, 185 S.E.2d 363, 364 (1971)). Mere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to establish an actionable breach of contract 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). It is the accompanying fraudulent act that is necessary to establish a viable cause of action. *Id.*

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) (holding the trial court erred in denying the defendant's motion for directed verdict on a claim for breach of contract accompanied by a fraudulent act when the plaintiff did not change his position because of any representation made by the defendant). 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.

In *Kelly v. Nationwide Mut. Ins. Co.*, 278 S.C. 488, 298 S.E.2d 454, 455 (1982), the South Carolina Supreme Court recognized explicitly that reliance on the misrepresentation must be proved to prevail on a cause of action for breach of contract accompanied by a fraudulent act. In *Kelly*, the plaintiff asserted claims for breach of an insurance contract and breach of contract accompanied by a fraudulent act. *Id.* The plaintiff's causes of action arose out of his claim for insurance coverage after his car was destroyed in a fire. *Id.* at 488-89. His insurer ("Nationwide") denied the claim because the plaintiff's policy had been cancelled three months earlier for nonpayment of premiums. *Id.* The plaintiff argued that Nationwide failed to give notice of the cancellation and made misrepresentations (the purported fraudulent act) concerning his available coverage. *Id.* The jury found in the plaintiff's favor on both claims; however, the trial court granted Nationwide's motion for judgment N.O.V. on the claim for breach of contract accompanied by a

fraudulent act. *Id.* On appeal, the Court affirmed the trial court's grant of judgment N.O.V. because there was no evidence that the plaintiff relied on the alleged misrepresentations—an essential element of the plaintiff's cause of action for breach of contract accompanied by a fraudulent act. *Id.*

The court in *Vann v. Nationwide Ins. Co.*, addressed similar claims and reached the same conclusion as the court in *Kelly*. 257 S.C. 217, 185 S.E.2d 363 (1971). In *Vann*, the plaintiff was involved in an automobile accident and had an automobile liability insurance policy containing provisions for medical and uninsured motorist coverage. *Id.* at 219. The plaintiff alleged that Nationwide refused to make payment for the plaintiff's medical bills unless he would agree to settle his liability claim under the UIM coverage provision of his insurance policy. *Id.* Thereafter, the plaintiff filed a complaint against Nationwide alleging a claim for breach of contract accompanied by a fraudulent act. *Id.* The trial court struck that cause of action from the Complaint and the plaintiff appealed. *Id.* at 220. On appeal, the South Carolina Supreme Court affirmed 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. *Id.* at 221.

In this case, the October 6 Order merely states, without explanation or reference to any evidence: "I find that the Contractor is owed nothing. I find the Contractor breached this Contract, and the breach was accompanied by a fraudulent act." (R-156). The Order contains no finding or identification of a fraudulent act accompanying the purported breach of the Contract. The Record in the case does not contain clear and convincing evidence that any fraudulent act by Balfour was committed which is connected in time or character to any purported breach of the Contract.

Furthermore, the Master made no finding, and there is no evidence, that Library changed its position as a result of any reliance on a purported fraudulent act or misrepresentation by Balfour.

Like the plaintiffs in *Kelly* and *Vann*, Library did not change its position based on any purported fraudulent act by Balfour. Thus, like the courts in *Kelly* and *Vann*, the Master should have found in Balfour's favor on Library's claim for breach of contract accompanied by a fraudulent act because Library failed to prove there was a fraudulent act accompanying the alleged breach or that it changed its position to its detriment based on a purported fraudulent act by Balfour.

These glaring omissions and defects in the October 6 Order were raised to the Master in Balfour's Rule 59(e) Motion. (R-23905). In that motion, Balfour directly raised to the Master the fact that in his October 6 Order he never found or identified a fraudulent act accompanying the purported breach of the contract and never described any change of position by Library in reasonable reliance upon any purported fraudulent act by Balfour. (*Id.*). As is the very purpose of a Rule 59(e) Motion, the Master was given an opportunity to address the glaring omission and error in his Order. Yet, he did not do so and merely denied the Rule 59(e) Motion without addressing the omissions and errors brought to his attention. The Master's inability and failure to address this glaring omission in his Order is itself dramatically telling.

In truth, the Master did not address or correct his omission and error because he cannot. 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. (R-154–155).

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.

IV. THE MASTER ERRED IN FINDING AND CONCLUDING THAT LIBRARY WAS ENTITLED TO AN AWARD OF $10,000,000 IN PUNITIVE DAMAGES FROM BALFOUR.

The only cause of action asserted by Library upon which any award of punitive damages could be based was the counterclaim against Balfour for Breach of Contract Accompanied by a Fraudulent Act. Punitive damages are not recoverable on a breach of contract action, or in connection with a declaratory judgment. *See Williams v. Metro. Life Ins. Co.*, 173 S.C. 448, 176 S.E. 340, 345 (1934). As set forth in the preceding argument, the Master erroneously found in Library's favor that a breach of contract accompanied by a fraudulent act had occurred. Alone, the correction of that error by the Master makes clear that it was further error for the Master to order any additional hearing or make any award with respect to punitive damages. No predicate for punitive damages exists as a matter of law. However, there are additional errors associated with the Master's handling of the punitive damages issue, and his ultimate award of punitive damages, which require reversal.

First, the Master erred in awarding Library punitive damages because: in his October 6 Order the Master made no necessary finding that Library proved, by clear and convincing evidence, at trial that its damages for breach of contract were the result of Balfour's willful, wanton, or reckless conduct.[6] Second, the Master erred in relying on improperly admitted evidence (which was not disclosed or presented prior to the close of the trial) to justify the award of punitive damages to Library. Third, the Master could not *sua sponte* order a "bifurcation" on the issue of punitive damages pursuant to S.C. CODE ANN. § 15-32-510, et seq. Finally, the Master did not have the power or authority to alter or amend the October 6 Order after ten (10) days had passed from the filing of that Order.

[6] The Master's Order was clear that the damages purportedly flowing from a breach of contract accompanied by a fraudulent act were exactly the same as those damages purportedly flowing from the simple breach of contract claim. There were no separate or additional damages flowing from any fraudulent act, or from any reliance or change of position by Library, or from any impact of willful, wanton, or reckless conduct by Balfour.

A. 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.

Nowhere in the October 6 Order does the Master state (make any findings of fact or conclusions of law) that Balfour was guilty of willful, wanton or reckless conduct which caused the actual harm of which Library complained. Such proof by clear and convincing evidence is the *sine qua non* for any award of punitive damages. S.C. CODE ANN. § 15-32-520(D); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Without such proof and finding by the Master in the first stage of trial, there can be no further proceedings or award of punitive damages. *Id*.

In the October 6 Order, the Master awarded Library $3,320,329.00 in actual damages on its breach of contract cause of action. (R-158–159). The Master awarded Library no other or separate damages on the cause of action for breach of contract accompanied by a fraudulent act. The failure to find or award any other or separate damages for the breach of contract accompanied by a fraudulent act should be determinative that none existed. The finding and award of only the exact same damages as the cause of action for breach of contract reflects Library incurred no damages as a result of a willful, wanton, or reckless act by Balfour; therefore, it is not entitled to an award of punitive damages. It was plain, reversible error for the Master to make such an award.

Punitive damages may only be awarded if the willful, wanton, or reckless conduct harmed the plaintiff. S.C. CODE ANN. § 15-32-520(D).

B. The Master erred in considering inadmissible and improper evidence to justify the award of punitive damages.

In the April 12, 2024 Order awarding Library punitive damages, the Master erroneously relied on improperly admitted evidence (which was not disclosed or presented prior to the close of

the trial) to justify the award of punitive damages to Library. In particular, the Master improperly admitted evidence related to a dispute (in another jurisdiction) between Balfour Beatty Communities, LLC—a wholly separate and distinct entity from Balfour Beatty Construction, LLC—and the United States' Government. *See* (R-0911–0912, 31:21 – 32:8).

Then, as stated in his April 12 Order, the Master relied upon that evidence to conclude that "[a] separate BBC entity has been convicted of criminal activity for very similar conduct." (R-208). Admission into evidence, and then reliance upon information about a legally separate entity to justify an award of punitive damages against Balfour in this case is improper and an error of law.

Section 15-32-520(E) of the South Carolina Code establishes what factors and what evidence are relevant and material to a consideration of punitive damages. Each and every consideration recognized in that statute is expressly conditioned on the evidence being specific to "the defendant [party against whom the punitive damages are alleged]." Thus, evidence about the conduct of other entities was neither relevant, nor admissible in this case.

Accordingly, the Master erred in admitting, considering, and then relying upon evidence related to a wholly separate and distinct entity. No foundation of any relationship between that entity and Balfour was ever established. Moreover, the Master compounded his error by relying on that evidence to award punitive damages in excess of the statutory cap on punitive damages set forth in S.C. CODE ANN. § 15-32-530(B)(2).

Furthermore, the Master failed to identify what conduct of Balfour is "very similar" to the conduct of Balfour Beatty Communities, LLC. The referenced conduct for which Balfour Beatty Communities, LLC—not Balfour Beatty Construction, LLC—entered into a plea agreement with the United States' Government relates to alleged violations of the Major Fraud Act, 18 U.S.C.A. § 1031. That act, and its fines and potential for criminal penalties, are all related to dealings with

the United States' Government. The United States' Government is not involved in any of the issues in this case, nor is the Major Fraud Act at issue in any way. Furthermore, the allegations against Balfour Beatty Communities, LLC relate to the alleged submission of false information regarding maintenance requests at military housing communities and attempts to receive "Performance Incentive Fees" from the United States' Government. Nothing in this case is similar or analogous to the actions of that wholly separate and distinct entity and there is nothing in the Record that ties the conduct of Balfour Beatty Communities, LLC with Balfour Beatty Construction, LLC.

C. 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.

Nearly twenty-two (22) months after the trial ended, the Master—for the first time—concluded that he may bifurcate the issue of punitive damages and reopen the Record on that issue. Such a decision by the Master was error.

The trial of the case was complete as of December 3, 2021. As of the conclusion of the trial, there had been no motion seeking bifurcation on the issue of punitive damages, and there had certainly been no order (or even mention) by the Master about such a bifurcation. In the October 6 Order, the Master concluded that "[a] hearing on punitive damages will be set by future Order of this Court." (R-159). The only other provision of the Order relevant to these issues is the Master's statement that:

> This Court, therefore, orders a bifurcated hearing on punitive damages pursuant to S.C. Sections 15-32-510 *et seq.* for contractor's breach of contract accompanied by a fraudulent act.

(R-157). The Order provided no other guidance regarding the purpose or scope of this future hearing or what about "punitive damages" would be addressed in the bifurcated hearing.

Although the Master expressly sought to justify his order for a bifurcated hearing on punitive damages by reliance on S.C. CODE ANN. § 15-32-510, *et seq.*, that statute provides no such justification for the Master's Order. Section 15-32-520(A) of the South Carolina Code addresses a bifurcated damages trial and provides that "[a]ll actions **tried before a jury** involving punitive damages, **if requested by any defendant** against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury." (emphasis added). The action on appeal was not a case tried before a jury and the Master cites to no request by Balfour for a bifurcation (because none occurred). Therefore, the Master did not have the authority to order a bifurcated hearing on the issue of punitive damages pursuant to S.C. CODE ANN. § 15-31-510.

If the Master intended to bifurcate the issue of punitive damages, then he should have informed the parties prior to the start of trial or—at a minimum—during trial. [7] Moreover, Library had the opportunity to present evidence relevant to an entitlement to punitive damages during trial but chose not to, whether for tactical or other reasons. Thus, it was inappropriate, unfair, and highly prejudicial to Balfour for the Master to give Library a second bite at the apple by allowing Library to reopen the case, the evidence, or the arguments and present additional evidence regarding punitive damages nearly 22 months after the conclusion of trial. Accordingly, the Court should reverse the Master's award of punitive damages to Library because the Master lacked the authority

[7] "Sound judicial practice requires that, so far as practicable, the trial court's decision to bifurcate proceedings occur prior to trial." *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 213 n.3. (6th Cir. 1985). However, "even in those cases in which a court bifurcated the proceeding after trial had begun, **such bifurcation was ordered before the trial had ended**." *State v. Comcast Cable Commc'ns Mgmt., LLC*, 482 P. 3d 925, 935 (Wash. App. 2021) (emphasis added). *See Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470 (6th Cir. 2007) (finding that the district court did not abuse its discretion in bifurcating trial into liability and punitive damages phases during the defendants' case-in-chief); *Smith v. Celotex Corp.*, Nos. 86–3663(L), 86–3664, 1988 WL 124993, at *2 (4th Cir. Nov. 23, 1988) (upholding trial judge's decision to bifurcate trial five days after opening statements had been made where plaintiffs failed to show any resulting prejudice); *Helminski* at 212–13 (finding that the district court did not abuse its discretion in bifurcating the issues of liability and damages towards the close of the plaintiffs' proofs).

to *sua sponte* order a hearing on punitive damages more than 22 months after the conclusion of trial.

D. 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.

A court does not have jurisdiction to alter or amend a judgment when more than ten (10) days have passed since the entry of the final order, unless a party has filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, and the party filing that motion has raised the specific issue and asked for a reconsideration in its motion. *See Heins v. Heins*, 344 S.C. 146, 160, 543 S.E.2d 224, 231 (Ct. App. 2001). Thus, the Master did not have the power or authority to alter or amend his October 6 Order, and award Library punitive damages, after ten (10) days had passed from the filing of the October 6 Order. Neither party filed a Rule 59(e) Motion requesting the Master to award Library punitive damages.

In *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127, the South Carolina Supreme Court was confronted with a case in which the circuit court entered a dispositive order on January 10, 1997, but neither party filed a Rule 59(e) motion within the 10-day period allowed by the Rule. Nonetheless, on February 10 the circuit court issued another dispositive order completely reversing itself from the January 10 Order. The court held:

> The trial judge's … order filed February 10, 1997, more than 30 days later, was patently untimely. Under Rule 59(e), SCRCP, the trial judge has only 10 days from entry of judgement to alter or amend an earlier Order on his own initiative….When no timely Rule 59 Motion was made nor timely *sua sponte* order filed under Rule 59(e), the January … Order "matured" into a final judgment. The Order filed on February 10 was a nullity because the trial Judge no longer had jurisdiction over the matter.

Id. at 494.

Any alteration of the October 6 Order to determine whether Balfour was guilty of willful, wanton or reckless conduct, or to award Library punitive damages was a *sua sponte* action by the

Master (since no party had requested it). Because the Master did not make such alteration or amendment within ten (10) days of October 6, 2023, he lost the authority (subject matter jurisdiction) to make such alteration or amendment. Without subject matter jurisdiction to amend the Order and award punitive damages, any award of punitive damages is error. The Master's ultimate award of punitive damages to Library must be reversed.

V. THE MASTER ERRED IN AWARDING ATTORNEY'S FEES AND COSTS TO LIBRARY AS THE PREVAILING PARTY UNDER THE SOUTH CAROLINA MECHANIC'S LIEN STATUTE IN THE AMOUNT OF $2,127,592.

As set forth in Argument Section I(D) of this Brief above, the Master was incorrect as a matter of law and erred in his conclusion that Balfour's mechanic's lien claim was improper. However, based on that error the Master undertook no other proper analysis of the mechanic's lien claim and was, therefore, unjustified in concluding that Library was, in fact, the prevailing party under the mechanic's lien statute. Without such a proper conclusion, the Master had no basis or jurisdiction to make any award of attorney's fees to Library pursuant to the lien statute. Thus, the Master erred and, at a minimum, the case must be remanded for proper consideration of Balfour's mechanic's lien claim. However, the award of attorney's fees is the result of additional error by the Master. The October 6 Order instructed Library "to submit its attorneys' fees and costs petition as the prevailing party . . . under the mechanic's lien statute, S.C. Code §29-5-10, *et seq*, within thirty (30) days of the date of this Order." (R-159) As is clear from the Order, the Master recognized that, at most, Library was only entitled to an award of attorney's fees to the extent authorized by the Mechanic's Lien statute and incurred in connection with a successful defense of a mechanic's lien foreclosure action. (R-150).

On November 6, 2023, Library filed its Petition for Attorneys' Fees and Costs. An affidavit from Library's counsel submitted with and in support of the Petition stated that, "[t]he subject litigation was extremely document intensive. I was required to review tens of thousands of pages

of project files [and] multiple expert reports and related documents pertaining to delay claims and defective construction." (R-24081). Moreover, the Affidavit of Library's counsel acknowledged the "total amount of attorneys' fees costs spent in fees and costs in this litigation is $2,026,278.55" (R-24081,¶10). Thus, the Record in this case plainly reveals that the "litigation", which counsel's affidavit acknowledges to have necessitated the total fees claimed, involved much more than the mechanic's lien foreclosure claim by Balfour. In fact, the "litigation" involved 12 separate causes of action asserted by Balfour, 6 counter claim causes of action alleged by Library (none of which involved the mechanic's lien statute), and causes of action alleged by 19 other, separate subcontractors. The law is clear that the "party who seeks attorneys' fees has the burden to show that request is well-founded …" and the failure of the requesting party to offer appropriate evidence of the legitimacy of the attorneys' fees requests precludes such an award. *Abbott v. Gore*, 304 S.C. 116, 119, 403 S.E.2d 154, 157 (Ct. App. 1991). Nonetheless, Library submitted nothing to segregate the work performed on the defense of the mechanic's lien claim compared to work performed in relation to the multitude of other claims at issue in this case. Again, Library failed to present appropriate evidence despite the fact that Library and its counsel knew well that the total amount of fees incurred related to (1) Library's defense of the twelve claims asserted by Balfour against Library; (2) Library's pursuit of the six counterclaims it asserted against Balfour; (3) the pursuit and defense of Library's claims against the subcontractors; and (4) the defense of the subcontractors' claims against Library. As such, the affidavits filed with the Petition for Attorneys' Fees utterly failed to meet Library's burden to submit evidence which would allow the Master to: (a) apportion the fees incurred in actually defending against the liens; (b) determine the time spent on any single task; or (c) evaluate whether the amount of time claimed is excessive, redundant, or otherwise unnecessary. *See Abbott*, 304 S.C. at 119, 403 S.E.2d at 157.

Four (4) months after filing its Petition, on the eve of the hearing on the Petition scheduled by the Master, Library filed a memorandum in support of its Petition, in which it argued—for the first time—that Library was entitled to an "enhanced" award of legal fees in an amount fifty percent (50%) higher than the $2,026,278.55 attorneys' fee figure set forth in Library's Petition. (R-24167). Not until that filing on March 7, 2024, did Library submit an affidavit from Marvin Infinger in support of its untimely request for an "enhanced" award of attorneys' fees. (*Id.*); *see also* (R-24174). This request for an award of significantly "enhanced" fees was both inconsistent with Library's Petition and violated the clear instruction of the Master that Library submit its fee petition by no later than November 6, 2023. (R-159).

Despite Library's failure to provide the Master with evidence that would enable him to determine which fees related to the defense of the Mechanic's Lien and the untimely submissions by Library, the Master awarded Library attorneys' fees in the amount of $2,127,592.

The Master erred in awarding Library attorneys' fees in the amount of $2,127,592 because (1) the Mechanic's Lien statute only authorizes a prevailing party to recover attorneys' fees incurred in the pursuit or defense of an action to foreclose a mechanic's lien; and (2) Library failed to request an enhanced award of attorneys' fees on or before the November 6, 2023, deadline.

A. The Master erred in awarding Library attorneys' fees associated with the litigation other than the defense of Balfour's cause of action to foreclose its Mechanic's Lien.

The Master erred in awarding Library attorneys' fees that were not incurred by Library in the defense of Balfour's cause of action to foreclose its Mechanic's lien.

Under South Carolina law, "[a]ttorney's fees are not recoverable unless authorized by contract or statute." *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). In an action to foreclose a mechanic's lien, the prevailing party may recover the attorneys' fees incurred in enforcing or defending against the lien. S.C. CODE ANN. § 29-5-10. However, "the fees are limited

. . . to those *actually* incurred in defending the lien." *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 620, 635 S.E.2d 922, 926 (Ct. App. 2006) (citation omitted); *Utilities Constr, Co. v. Wilson*, 321 S.C. 244, 250, 468 S.E.2d 1, 2 (Ct. App. 1996) (holding amount of attorney's fees in mechanic's lien action was excessive where trial court awarded property owner attorney's fees which included fees associated with the underlying contract cause of action; remanding to trial court to enter amount of attorney's fees "based upon time [property owner's counsel] spent in defending the mechanic's lien cause of action only").

The affidavits submitted by Library in support of its Petition for Attorneys' fees states plainly that on November 6, 2023, the **total** amount of attorneys' fees incurred by Library in the entire litigation was $2,026,278.55.[8] (R-24081, ¶10) (emphasis added). Nevertheless, the Master awarded Library attorneys' fees in the amount of $2,127,592. (R-194).

There is simply no basis in South Carolina law for awarding attorneys' fees greater than the total of all of the attorneys' fees Library's counsel stated had been incurred by Library in his November 6, 2023 affidavit. The Mechanic's Lien statute authorizes only an award of those fees and costs incurred in the defense of a mechanic's lien claim, and South Carolina courts have not recognized a court's authority to issue an enhanced attorneys' fee award to a prevailing party in a Mechanic's Lien dispute. Therefore, Library is not entitled to recover attorneys' fees in an amount greater than what was actually expended in defense of Balfour's action to foreclose its Mechanic's Lien. *See EFCO Corp.*, 370 S.C. at 620, 635 S.E.2d at 926; *Cedar Creek Properties v. Cantelou*

[8] After making several requests for the invoices supporting Library's Petition for Attorneys' fees, those invoices were made available. Franklin Worrell (a Certified Public Accountant retained by Balfour) reviewed Library's invoices in the absence of Library providing any breakdowns of the fees among the various issues in the litigation. On March 28, 2024, Balfour submitted an Affidavit of Mr. Worrell which included his findings and conclusion from the actual detailed reviews of the attorneys' invoices, which allowed him to conclude that the fees and costs incurred by Library broadly with respect to the defense of Balfour's mechanic's lien claim were no more than $1,364,706.00.

Assocs., Inc., 320 S.C. 483, 486–87, 465 S.E.2d 774, 776 (Ct. App. 1995). Accordingly, the Court should reverse the "enhanced" attorneys' fees award because such fees are not recoverable by a prevailing party in a mechanic's lien dispute.

B. The Master erred in accepting and considering the Memorandum in Support of Attorneys' Fees and Affidavit of Marvin Infinger because those documents were submitted to the Master months after Library's deadline to make such submissions.

The Master should have refused to accept or consider Library's untimely request for an enhanced award of attorneys' fees and should have excluded Mr. Infinger's affidavit or testimony because they were untimely and contained inadmissible conclusions of law. *See* Rule 6(d), SCRCP (stating that "[w]hen a motion is to be supported by affidavit, the affidavit *shall be* served with the motion"); Rule 702, SCRE; *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003); *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106–107, 249 S.E.2d 734,739–740 (1978). Therefore, not only should the request for "enhanced" fees have been submitted by no later than November 6, 2023, any affidavit supporting such a request must have been filed at the same time. Neither the request for enhanced fee award nor the Infinger Affidavit were submitted in a timely fashion. The late submissions were inherently prejudicial and the Master's acceptance of and reliance upon such materials was an abuse of discretion. Accordingly, the Master erred in awarding Library an "enhanced" attorneys' fee because the request for such an award was untimely, improper and unjustified. The award should be reversed.

VI. THE MASTER ERRED IN FINDING AND CONCLUDING THAT HE HAD AUTHORITY UNDER THE SOUTH CAROLINA DECLARATORY JUDGMENT ACT TO AWARD LIBRARY THE AMOUNT OF $655,197 FOR THE WITNESS FEES AND COSTS FOR THE WORK OF ITS EXPERT WITNESS HADLEY.

A. 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.

On the tenth day of trial, and following the conclusion of Balfour's case-in-chief, counsel for Library withdrew Library's counterclaim for declaratory judgment, stating:

> I don't need to put in any evidence, so I withdraw my dec action. But I would like a ruling on the pending dec action brought by [Balfour]. Thank you, Your Honor.

(R-3588, 2554:3–7).

Library having withdrawn the counterclaim for declaratory judgment, the Master could not grant Library any relief pursuant to that counterclaim. *See Hall v. Benefit Ass'n of Ry. Emps.*, 164 S.C. 80, 161 S.E. 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial."); *see also Fyall v. ATC/Ancom of S.C., L.P.*, No. 2:04-23086-CWH, 2005 WL 2656962, at *4 (D.S.C. Oct. 18, 2005) (stating the plaintiff may not revive a claim for breach of contract after his counsel withdrew the claim on the record during oral argument). Therefore, the Master erred in granting declaratory judgment in favor of Library and awarding Library the fees and costs incurred for the work of Library's expert witness Hadley.

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

Among the various purported causes of action asserted by Library against Balfour under the label of counterclaims was a cause of action denominated as a cause of action for Declaratory Judgment. In truth, review of the purported counterclaim pursuant to the Declaratory Judgment Act reveals clearly that it is nothing more than a veiled or repackaged allegations of a claim for breach of contract and an additional argument in opposition to the mechanic's liens filed by Balfour and the Subcontractors. 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.

The decision to grant or deny a claim for declaratory judgment is a matter that is left to the discretion of the court. *Eargle v. Horry Cnty.*, 344 S.C. 449, 453, 545 S.E.2d 276, 279 (2001). The court is to exercise its discretion in furtherance of the intended purpose of the Declaratory Judgment Act, which is to: (1) provide "a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure"; and (2) settle legal rights and "remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships." *Williams Furniture Corp. v. S. Coatings & Chem. Co.*, 216 S.C. 1, 6, 56 S.E.2d 576, 578 (1949); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004); *Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170, 785 S.E.2d 595, 600 (2016). In exercising its discretion and determining whether to grant a declaratory judgment, courts consider whether the claim is duplicative of the party's other claims; whether other remedies are available; and whether statutory remedies are available. *See Williams Furniture Corp.*, 216 S.C. at 7, 56 S.E.2d at 578. A merely duplicative or superfluous claim under the guise of a declaratory judgment is not proper.

In this case, the Master made no finding or statement regarding any of these considerations and failed to justify any basis (any justification for exercising discretion) in favor or support of deciding whether to grant declaratory judgment in favor of Library. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the [circuit court] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) ("A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion.").

In deciding whether to exercise their discretion to grant a declaratory judgment, courts have routinely concluded that a claim for declaratory judgment should be denied when there are other available remedies—including when the claim is simply duplicative of the party's other claims.

For example, in *Williams v. Progressive Flood Ins., Inc.*, No. 4:20-CV-01887-JD, 2021 WL 9958652, at *4 (D.S.C. Nov. 3, 2021), the plaintiffs filed an insurance coverage action against their insurer asserting causes of action for breach of contract and declaratory judgment after the plaintiffs' insurer denied coverage following a flood event that allegedly damaged the plaintiffs' home. The plaintiffs sought a declaratory judgment that "the Property was damaged by a flood event, and as such any damage related thereto is covered under the terms of the Policy." *Williams*, at *4. The District Court granted summary judgment in favor of the defendant on the plaintiffs' purported cause of action for declaratory judgment and dismissed the asserted cause of action because that cause of action "[was] subsumed in [the] Plaintiffs' Breach of Contract cause of action and, therefore, it [was] redundant and immaterial." *Williams*, at *4.

Similarly, in *Lowe v. City of Charleston*, 597 F. Supp. 3d 855, 863–64 (D.S.C. 2022), the plaintiffs filed a complaint against the City of Charleston asserting causes of action for declaratory judgment and violation of the Fourteenth Amendment's Equal Protection clause based upon the city's actions in denying the plaintiffs' rezoning application. Similar to the reasoning by the court in *Williams*, the court in *Lowe* granted the defendant's motion for summary judgment as to the plaintiff's declaratory judgment cause of action because the claim was repetitious of the issues already before the court in other alleged causes of action. *Lowe*, 597 F. Supp. 3d at 863; *see also Metra Indus., Inc. v. Rivanna Water & Sewer Auth.*, 2014 WL 652253, at *2 (W.D. Va. Feb. 19, 2014)(recognizing that a "declaratory judgment serves no useful purpose when it seeks only to adjudicate an already-existing breach of contract claim" and where the same conduct underlies the declaratory judgment and breach of contract claims); *Monster Daddy LLC v. Monster Cable Prods., Inc.*, 2010 WL 4853661, at *5 (D.S.C. Nov. 23, 2010) ("District courts have dismissed counterclaims under the Declaratory Judgment Act where they have found them to be repetitious of issues already before the court via the complaint or affirmative defenses.").

Library's cause of action for declaratory judgment is defective and improper in the same way such causes of action were defective and improper in the *Williams* and *Lowe* cases, because it is merely duplicative of Library's other causes of action and affirmative defenses. Library's cause of action for declaratory judgment requests that the Court declare Balfour must bond off the mechanic's lien (an alleged obligation under the contract); declare that a contractor and subcontractor cannot file duplicative mechanic's lien (an allegation that mirrors allegations pled in support of Library's causes of action for breach of contract accompanied by a fraudulent act and violation of the South Carolina Unfair Trade Practices Act); and declare which portions of Balfour's mechanic's lien are not subject to a claim for a mechanic's lien (a defense Library raised in opposition to Balfour's cause of action for mechanic's lien foreclosure). *See* (Answer and Counterclaims of Library Associates LLC to the Second Amended Complaint). Because Library's claim for declaratory judgment is merely a vehicle for realleging its other claims and defenses, the Master should have refused to grant Library any relief pursuant to the declaratory judgment cause of action. Accordingly, the Master erred in granting declaratory judgment in favor of Library and attempting to use the South Carolina Declaratory Judgment Act as an excuse for awarding Library $655,197 in "costs" incurred for the services of Library's expert witness Hadley.

C. 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.

The Master compounded the error of granting declaratory judgment in favor of Library by improperly awarding Library $655,197 in "costs" incurred for the services of Library's expert witness Hadley pursuant to S.C. CODE ANN. § 15-53-100.

There is no South Carolina authority supporting the proposition that expert witness fees are recoverable as "costs" under the Declaratory Judgment Act, S.C. CODE ANN. §§ 15-53-10 to -140.

The Declaratory Judgment Act merely allows a court to make an "award of costs" for successful prosecution of a valid and proper action for declaratory judgment. S.C. CODE ANN. § 15-53-100. "Costs" in the litigation context are well understood and limited. "[F]ees for expert witnesses, beyond the ordinary fees authorized for witnesses generally, are not taxable as costs unless there is a statute specifically allowing such an expense." *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318–19, 422 S.E.2d 128, 132 (1992) (quoting 20 C.J.S. Costs § 116 (1990)). South Carolina has no such statute specifically authorizing an award of expert witness fees and costs in this case. It is telling that the Master cited no such authority in support of his decision to make such an award.

Significantly, other jurisdictions reviewing the issue of whether expert witness fees or costs are recoverable costs pursuant to the Uniform Declaratory Judgment Act have concluded that they are not.[9] For example, in *Chapin v. Collard*, 29 Wash. 2d 788, 189 P.2d 642 (1948), the Washington Supreme court held that accountant fees were not "costs" within the meaning a Washington Declaratory Judgment Act. Like South Carolina, Washington adopted the Uniform Declaratory Judgment Act and the relevant language of the two statutes is identical. *See* S.C. CODE ANN. § 15-53-100; WASH. REV. CODE ANN. § 7.24.100. Both statutes state only that "the court may make such award of costs as may seem equitable and just." *Id*. The court in *Chapin* held that accountant fees were not "costs" within the meaning of the Declaratory Judgment Act and concluded that the trial court had no authority to award accountant's fees as costs. *Chapin*, at 795. In reaching this conclusion, the court stated that:

> Where an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party as a part of the

[9] The South Carolina Declaratory Judgment Act is expressly modeled on the Uniform Declaratory Judgment Act. S.C. CODE ANN. § 15-53-140 (stating that the South Carolina Declaratory Judgment Act is to be "interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact substantially identical legislation").

> costs of the action. . . if either party sees proper to employ the services of an expert for his own benefit, the court should not require the opposite party to pay for the services thus rendered.

Chapin, 29 Wash. 2d 788, 796, 189 P.2d 642, 647 (1948) (citation omitted).

Like the plaintiff in *Chapin*, Library is similarly unable to recover the fees of its accounting expert (Hadley) as "costs" under South Carolina's Declaratory Judgment Act. Accordingly, the Court should reverse the Master's award of $655,197 in "costs" incurred by Library for the services of Library's advocate and expert witness Hadley.

CONCLUSION

Based on the forgoing and for the reasons stated herein, Balfour respectfully requests the Court:

1. Reverse the Master's finding that Balfour breached the Contract;
2. Reverse the Master's award of $1,483,000 in liquidated damages to Library;
3. Reverse the Master's award of $2,256,764 to Library for costs to complete the work;
4. Reverse the Master's finding in Library's favor on its claim for breach of the contract accompanied by a fraudulent act;
5. Reverse the Master's award of $10,000,000 in punitive damages to Library pursuant to Library's breach of the contract accompanied by a fraudulent act cause of action;
6. Reverse the Master's finding that declaratory judgment in favor of Library was proper;
7. Reverse the Master's award of $655,197 for the witness fees and costs to Library for its expert witness Hadley pursuant to the Declaratory Judgment Act;
8. Reverse the Master's findings regarding Balfour's perfection of its Mechanic's Lien and find that Balfour's Mechanic's Lien was properly perfected in accordance with the Mechanic's Lien Statute;
9. Reverse the Master's award of $2,127,592 in attorneys' fees to Library pursuant to the South Carolina Mechanic's Lien Statute;

10. Remand the case for a proper analysis of Balfour's Mechanic's Lien foreclosure cause of action and an assessment as to who is the prevailing party on that cause of action;

11. Reverse the Master's finding that Library did not breach the Contract and remand the case for a determination of the damages owed to Balfour for payments not made pursuant to the Contract and for payments not made to Balfour for change orders and RCOs that were not properly processed or paid by Library; and

12. Remand the case for a new trial that does not include improper expert, including testimony from experts offering opinions that were not disclosed to all of the parties prior to the start of trial.

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