THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2023-001178
Case No. 2018-CP-23-04740

Flatiron-Zachry, a Joint Venture, Appellant,

v.

Civil Engineering Consulting Services, Inc. c/b/a Civil Engineering Consultant Services, Inc.; ECS Southeast, LLP f/k/a ECS Carolinas, LLP; Mead and Hunt, Inc.; Stantec Consulting Services, Inc.; and T.Y. Lin International, Defendants,

Of which Stantec Consulting Services, Inc. is the Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

TABLE OF EXHIBIT ABBREVIATIONS

Abbreviation	Document Name	Date
Arb. Agmt.	Agreement to Arbitrate	November 18, 2019
Award	Order on Stantec's Motions for Summary Judgment	November 5, 2021
Brief	Initial Brief of Appellant	February 12, 2024
Cmplt.	Complaint	September 14, 2018
Form 4 Order	Form 4 Order Denying Motion to Vacate	March 14, 2022
Int. Ans.	Plaintiff, Flatiron-Zachry, A Joint Venture's Response to Defendant Stantec Consulting Services, Inc.'s Interrogatories	November 19, 2020
Mot.Vac.1	Notice of Motion and Motion to Lift the Stay for Application to Vacate	February 3, 2022
Mot.Vac.2	Notice of Motion and Motion to Lift the Stay for Application to Vacate	June 22, 2022
NOA	Notice of Appeal	July 20, 2023
OCL Aff.	Affidavit of Kenneth O'Connell, Ph.D, P.E.	September 11, 2018

Opp.Reconsid.Mot.2	Stantec Consulting Services, Inc. Response in Opposition to Claimant Flatiron-Zachry, A Joint Venture's Second Motion for Clarification or, in the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services, Inc.'s Motion for Summary Judgment	March 23, 2022
Opp.Vac.1	Stantec Consulting Service's Inc.'s Opposition to Plaintiff's Application to Vacate Arbitration Award	February 11, 2022
Opp.Vac. 2	Stantec Consulting Service's Inc.'s Opposition to Plaintiff's [Second] Application to Vacate Arbitration Award	June 27, 2022
Reconsid. Mot. 1	Claimant Flatiron-Zachry, A Joint Venture's Motion for Clarification or, in the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services, Inc.'s Motion for Summary Judgment	November 24, 2021
Reconsid. Mot. 2	Claimant Flatiron-Zachry, A Joint Venture's **Second** Motion for Clarification or, in the Alternative, Motion for Reconsideration Regarding the Order on Stantec Consulting Services, Inc.'s Motion for Summary Judgment	March 18, 2022
Rule 59(e) Mot.	Plaintiff's Amended Motion to Reconsider	October 18, 2022
Sched. Ord.	Amended Scheduling Order	May 17, 2021

INTRODUCTION

This appeal constitutes an unjustified attack on three respected arbitrators (the "Panel"). Attempting to avoid the substantial deference due an arbitration award, Appellant conjures the specter that the Panel engaged in misconduct by refusing to hear evidence, disregarding the summary judgment standard, and failing to adhere to the arbitration rules. Nothing could be further from the truth. These arguments have been rejected on as many as six separate occasions -- in the Award, in response to two Applications to Vacate, and in response to three Motions to Reconsider.

The Panel awarded summary judgment to Stantec Consulting Services Inc. ("Stantec") principally finding that Stantec did not have a duty to perform the services relevant to the claims against it. ("Award", pp. 2-3, R. _). Appellant's interrogatory answers disclosed the lack of any basis to assert that Stantec had such a duty. ("Int. Ans.", R. __). In fact, the entity that hired Stantec, Civil Engineering Consultant Services, Inc. ("CECS"), testified it did not assign such duties to Stantec. The Court properly denied the Appellant's Application to Vacate and its order should be affirmed.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Court has jurisdiction over this appeal.
2. Whether Appellant demonstrated by clear and convincing evidence that the arbitrators engaged in misconduct by refusing to hear pertinent and material evidence.
3. Whether the arbitrators manifestly disregarded the law.

STATEMENT OF THE CASE

A. Background

Appellant was the design-builder of improvements to the I85/385 interchange in Greenville (the "Project") and was responsible for both the design and construction of the Project. (Cmplt. ¶¶

7 and 9, R. __). Appellant subcontracted with CECS to be lead designer. (Cmplt. ¶¶ 9, 17 and 18, R. __). CECS subcontracted with Stantec for the design of Bridge 11, and preparation of traffic control, traffic management, and specific traffic signal plans. ("OCL Aff." ¶ 10(c), R. __).

B. Commencement of the Action and Affidavit of Merit

Appellant commenced this action in the Court of Common Pleas on September 14, 2018. Appellant alleged that the defendants' pre-bid[1] services were deficient causing Appellant to underprice the cost of construction when bidding on the Project. (Cmplt. ¶¶ 16, 25, 26, R. __).

Pursuant to S.C. Code Ann. § 15-36-100(C)(1)(1976), Appellant filed the Affidavit of Dr. Kenneth O'Connell, a professional engineer. Relevant to Appellant's claim that, as of September 2021, it lacked information because discovery was in its "infancy," Dr. O'Connell stated that, before 2019, he interviewed witnesses and, reviewed: (1) the owner's request for proposal; (2) Appellant/CECS' Teaming Agreement and Design Contract; (3) Teaming Agreements and subcontracts between CECS and its design subconsultants; (4) preliminary and final design documents; and (5) many other project documents. (OCL Aff. ¶ 8, R. __).

Appellant has previously defended the baselessness of its claims by pointing to the claims identified with Stantec in the affidavit. (OCL Aff. ¶¶ 10(b), 10(f), 10(h), 10(i) and 10(k), R. __). However, Appellant withdrew all these claims against Stantec. Later, Appellant attempted to imply that Stantec was involved with other claims, which are the subject of this appeal.

C. The Agreement to Arbitrate and Agreed Scheduling Order

Following the execution of an Agreement to Arbitrate (Arb. Agmt., R. __), the Court stayed the litigation on November 19, 2019. (11/19/19 Order, R. __). The Agreement to Arbitrate did not

[1] "Pre-bid" and "pre-award" are used interchangeably to describe the period before the award of the Project when preliminary design information was supplied to Appellant.

prohibit summary judgment motions prior to close of discovery. (Arb. Agmt., R. __). The agreed Amended Scheduling Order permitted dispositive motions to be filed on or before January 31, 2022, regardless of discovery status. ("Sched. Order" ¶ 5, R. __).

D. Stantec's First Motion for Summary Judgment

Two years after it sued Stantec, Appellant answered Stantec's interrogatories stating that it could not identify errors and omissions or damages caused by Stantec. Appellant responded "that the designers committed errors and omissions in *their* design, and [Appellant] is without knowledge or information to form an opinion as to whether Stantec, specifically, contributed to those errors or omissions." (Int. Ans. 5, R. __) (Emphasis in original).

Appellant also served Dr. O'Connell's report which failed to specify negligence by Stantec. ("Opp.Vac. 1" p. 3, R. __). In January 2021, Stantec moved for summary judgment arguing that Appellant failed to produce expert opinion required by law. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 472, 570 S.E.2d. 197, 203 (Ct.App. 2002). (Opp.Vac. 1 p. 3, R. __). The Panel "dismissed" the motion as premature "with leave to be brought again at the close of discovery…" (Panel's February 9, 2021 Order, R. __).

Appellant misrepresents the Panel's order, stating "summary judgment could not properly be sought by Stantec until the close of discovery." (Brief at pp. 14-15). Paraphrasing, Appellant transformed "Stantec *may* file *this* motion for summary judgment at the close of discovery" into "Stantec is *prohibited* from filing *any* motion for summary judgment until the close of discovery."[2] There was no such prohibition. Further, Stantec did not renew this motion. (Section E below).

[2] Appellant repeats the mischaracterization on page 10 of the Brief but more accurately characterizes it on page 3 of its Brief. (See, Brief p. 3, entry for 2/9/2021).

E. Stantec's September 13, 2021 Motions for Summary Judgment

On September 13, 2021, following the submission of many expert reports, substantial written discovery and several depositions, Stantec filed six motions for summary judgment each addressing a discrete claim.[3] The pre-bid claims were for: drainage design (Motion 1); temporary drainage design (Motion 2); roadway design (Motion 3); Wall 32 design (Motion 4); and bridge design (the "Geomembrane Claim") (Motion 5). Appellant asserted one post-award claim for delay allegedly caused by temporary drainage design (Motion 6). (Award p. 2, R. __). Unlike the prior motion, these motions addressed the elements of duty (Motions 1, 2 and 4) and damages (Motion 6), not breach. (Opp.Vac. 1 p. 3, R. __).[4] Appellant withdrew the roadway design claims.

F. The Panel's November 5, 2021 Arbitration Award

The Panel's November 5, 2021 Award is the subject of Appellant's two Applications to Vacate. With respect to pre-bid drainage (Motion 1), pre-bid temporary drainage (Motion 2), and pre-bid Wall 32 design (Motion 4), Stantec established that it was not contractually responsible for the subject services. Stantec's Motion 5 was based on the statute of limitations. With respect to Motion 6, Stantec showed that there was no damage. (Award p. 2-4, R. __).

Based on the contracts, CECS' testimony, and other evidence, the Panel found that Stantec did not have a duty to design the elements at issue in Motions 1, 2 and 4. (Award pp. 2-3, R. __) The Panel also rejected Appellant's new assertion that Stantec's final design could not deviate

[3] Appellant incorrectly stated that, as of September 13, 2021, no depositions had been taken. (Brief p. 3, *see*, 9/13/21 entry). By that date, the depositions of Edelberg, Kilgore, Lamm, Ilg and Kneece had been taken. CECS' Kneece was the only corporate designee who testified on behalf of CECS and, contrary to Appellant's claim, his 399-page deposition was complete.

[4] Appellant incorrectly implies that the grounds and evidence for the January 2021 and September 2021 motions were the same and that, therefore, the Panel's refusal to delay ruling was inconsistent with its action on Stantec's initial dispositive motion. (Brief p. 17). The grounds and evidence were, in fact, different. (Opp.Vac. 1 p. 10 and n. 6, R. ___).

from the pre-bid design negligently prepared by others. Appellant retreated to this argument when it awakened to Stantec's lack of duty for the pre-bid services. The Panel aptly found:

> After receiving Stantec's expert's report which confirmed that Stantec did not perform pre-award drainage design of any kind, FZJV's expert issued a rebuttal report opining that Stantec was under an obligation to follow the pre-award design and that its failure to do so was a breach of the standard of care. This position is illogical in that it suggests that Stantec was bound by the preliminary design and could not deviate from it. As FZJV's expert noted, the preliminary drainage design was inadequate and Stantec's post-award drainage design corrected some of these inadequacies. Further, FZJV's expert's interpretation that the contract required Stantec to follow the pre-award design is not accurate. The provision requires the Designer "to the extent reasonably possible" to avoid deviation from the preliminary design. This does not require the Designer to follow the preliminary design when it is deficient or inaccurate. (Award p. __, R. __).

The Panel also rejected Appellant's contention that it had insufficient opportunity to investigate its claims. (Award p. 2, R. __). The pre-bid services were rendered seven years earlier, the litigation was three years old, significant document production had occurred, and key depositions had been completed. Appellant extensively reviewed the project records and served multiple expert reports. (Opp.Vac. 1 pp. 1 and 10, n. 6, R.__).

Appellant failed to identify the evidence that would refute CECS' testimony that it did not task Stantec with the pre-bid design at issue. Instead, Appellant merely listed depositions still to be taken. For example, as it does in this appeal, Appellant contended that it would have taken depositions of *its own employee and expert.* (Brief p. 11). These individuals obviously had no relevant testimony. If they did, such evidence should have been supplied by affidavit.

Contrary to Appellant's assertion that the Panel made no findings on Appellant's request for additional discovery, the Panel soberly considered the request and concluded:

> While the Panel is mindful that completing discovery is often necessary to determine whether there are genuine issues of material fact that would prevent issuing summary judgment, we find that based on the claims asserted against Stantec, the evidence presented [by] Stantec, FZJV's responses to the summary judgment and progress of discovery to date there is sufficient evidence to conclude

that there are no genuine issues of material fact relating to claims against Stantec on items 1-4 and 6. (Award p. 2, R. __).

Accordingly, finding no material facts in dispute with respect to Motions 1, 2, 4 and 6, the Panel granted Stantec's motions. The Panel concluded that issues of disputed material fact prevented summary judgment on Motion 5 and denied it. (Award pp. 3-4, R. __).

G. Appellant's First Motion for Clarification or, in the Alternative, Motion for Reconsideration ("Reconsideration Motion 1")

Appellant filed Reconsideration Motion 1 on November 24, 2021. (Reconsid. Mot. 1, R. __).[5] Appellant feigned confusion about whether the Panel's order granting Stantec's Motion 4 meant "granted," as stated, or "granted in part," words the Panel did not use. The Panel denied this motion on December 8, 2021 stating "the Panel's Order dated November 5, 2021 is hereby confirmed," leaving no doubt that Appellant's arguments did not warrant clarification or additional discussion. (Panel 12/8/21 Order p. 1, R. __).

H. Appellant's First Application to Vacate and Failure to Appeal

On February 3, 2022, Appellant filed its Application to Vacate the November 5, 2021 Award. Appellant contended that the Panel refused to hear evidence, violated Construction Industry Arbitration Rules and Mediation Procedures ("AAA Rules") Rule 34, and manifestly disregarded the summary judgment standard. (Mot.Vac., R. __).

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[5] Appellant's Motions to Reconsider 1 and 2 were submitted to this Court with Stantec's Motion to Dismiss Appeal. This Court granted leave to raise the jurisdictional argument in this appeal. Therefore, the motion papers and exhibits have been made a part of the record. **The record pages that are included solely for the jurisdictional argument are R. __ to R. __.** Stantec acknowledges that these documents were not presented to the trial court and, therefore, are relevant only to the jurisdictional issue. Therefore, Stantec does not expect Appellant, in reply, to rely on these documents other than in connection with the jurisdictional argument. If Appellant does not restrain itself to that limitation, it is important to note that Stantec's Opposition to the Second Reconsideration Motion is also included in the record and contains important corrections to misstatements contained in Appellant's reconsideration motions. (Opp.Reconsid. Mot. 2, R. __).

Stantec responded that the Panel did not engage in misconduct and considered all evidence that was presented to it. Stantec rebutted Appellant's claims that the Panel disregarded the AAA Rules and the summary judgment standard. In fact, the Panel applied the standard when granting Motions 1-4 and 6 and when denying Motion 5. (Award p. 3, R.__). The Court (Verdin, J.) denied the motion on March 15, 2022. (Form 4 Order, R. __). Appellant did not appeal.

I. Appellant's Second Motion for Clarification or, in the Alternative, Motion for Reconsideration ("Reconsideration Motion 2")

Appellant filed Reconsideration Motion 2 with the Panel on March 18, 2022. (Reconsid. Mot. 2, R. __). This motion was filed outside of the 20-day time limit afforded by AAA Rule 51. In addition, the Panel no longer had power to change the Award. *See*, Section I.B.3, below.

The Panel reviewed Reconsideration Motion 2 and again reaffirmed its November 5, 2021 Award. Nothing in the Panel's Award changed substantively. (Panel 3/24/22 Order, R. __). However, the Panel corrected an insignificant typographical error and, reacting to Appellant's persistence, reiterated that the entirety of Motion 4 was granted. *See*, Section III.C, below.

J. Appellant's Second Application to Vacate and Motion to Reconsider

On June 22, 2022, Appellant again moved to vacate the Award and strangely sought vacatur of the clarification for which it had asked. ("Mot.Vac. 2", R. __). On October 6, 2022, the Court (Verdin, J.) denied this motion. (10/5/22 Court Order, R.___). Appellant sought reconsideration which the Court denied on June 21, 2023. (6/20/23 Court Order, R. __). Appellant filed a Notice of Appeal on July 20, 2023. (NOA, R. __).

K. Motion to Dismiss Appeal

Stantec moved to dismiss the appeal for lack of jurisdiction. This Court denied the motion without prejudice to renew the argument in the appeal. (11/9/23 Order, R. __).

ARGUMENT

I. The Court Lacks Jurisdiction to Consider This Untimely Appeal.

A. Applicable Standard

An appeal must be filed within thirty days of the judgment or order appealed from. Rule 203(b), SCACR. This Court lacks jurisdiction over late appeals and "has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline for service of the notice." *USAA Property & Casualty Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). In addition, the time for filing the notice of appeal was not stayed by Appellant's successive filings.

> An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. An appeal may also be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical written Rule 59(e) motion.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004).

B. Appellant's Successive Filings Cannot Resurrect this Court's Jurisdiction.

1. Appellant Has Repeatedly Recycled the Same Arguments.

Appellant's two applications to vacate and its Amended Motion to Reconsider were recaptioned versions of each other. (Compare Rule 59(e) Mot., R. __ to Mot.Vac. 1 and 2, R. __and __). According to Appellant, "The legal basis for vacatur of the Panel's March Award is nearly identical to that previously provided by [Appellant] for vacatur of the Panel's November Award." (Mot.Vac.2 p. 5, R. __). Having considered two sets of briefs and having heard argument twice, the Court concluded: "after reviewing the very fine briefs on both sides and hearing the arguments here today, I'm going to respectfully deny your motion." (Transcript p. 18, R. __). Instead of appealing, Appellant made a third attempt raising the same arguments in its Rule 59(e)

motion where it "incorporated by reference" the same arguments it made in the Second Motion to Vacate. (Rule 59(e) Mot. p. 4 n.1, R. __). If not from March 15, 2022, when the Court denied the first Application to Vacate, timeliness should be measured from October 6, 2022, when the second Application to Vacate was denied. The July 20, 2023 Notice of Appeal was late.

2. The Second Application to Vacate Was Untimely.

Appellant's Second Application to Vacate was also late. In the Second Application to Vacate, Appellant requested that the Court "enter an Order vacating the Panel's November 5, 2021 and March 24, 2022 awards…" (Mot.Vac. 2 p. 13, R. __). The November Award was older than three months and the so-called "March award" was, in fact, a ruling on a motion to reconsider. Motions to vacate must be filed within three months of an award, not the ruling on a motion to reconsider. 9 U.S.C. § 12 ("…within three months after the award…"); *Gonzalez v. Mayhill Behavioral Health, LLC,* No. 4:21-MC-00188, 2022 WL 1185889 (E.D. Tex. 2022) at * 3-4 (applying "plain meaning" rule to require filing of motions to vacate within three months of *award,* not from the denial of a motion to reconsider, and collecting cases explaining the reason for the rule); *Eatman's, Inc. v. Martin Engineering, Inc.*, 311 S.C. 282, 284, 428 S.E.2d 736,737 (Ct. App. 1993) (once the three month period has passed, attempt to vacate award cannot be made).

Appellant's representation that the March 24, 2022 order of the Panel materially altered the November 5, 2021 Award is also incorrect. *See* Section III.C, below.[6]

3. The Second Reconsideration Motion and Second Motion to Vacate are Nullities.

The Panel lacked power to entertain Reconsideration Motion 2 or to issue the March 24, 2022 order. Therefore, there should never have been a Second Application to Vacate. AAA Rule

[6] After the March 24, 2022 Order, Appellant still had 19-days to appeal the Court's denial of the First Motion to Vacate, a fact acknowledged by Appellant in footnote 3 to Reconsideration Motion 2. (Reconsid. Mot. 2 p. 3 n. 3, R. ___). Appellant still did not appeal.

51 afforded Appellant 20-days to move to correct clerical, typographical, technical or computational errors in the Award.[7] The Panel could reconsider the merits only "if the award is vacated" and the Court directed a "rehearing by the arbitrators." 9 U.S.C. § 10(b); *Sodexo Management, Inc. v. Detroit Public Schools*, 200 F. Supp. 3d 679, 696 (E.D. Mich. 2016) ("…arbitrator…is not empowered to redetermine the merits of any claim already decided'"). The denial of the first Application to Vacate operated to confirm the Award and collateral estoppel then attached. *Hale v. Morgan Stanley*, 571 F. Supp. 3d 872, 886-87 (S.D. Ohio 2021). Accordingly, both Reconsideration Motion 2 and the second Application to Vacate are legal nullities.

4. Appellant Is Estopped from Denying the Finality of the November 5, 2021 Award.

In response to Stantec's Motion to Dismiss the Appeal, Appellant contended that the November 5, 2021 Award was not a final award because the Geomembrane Claim was not yet resolved. Yet, under the FAA, partial awards that resolve an entire issue are final. *Crawford Group, Inc. v. Holekamp*, 2007 WL 844819 (E.D. Mo. 2007) at * 4 and cases cited. The parties understood and treated the November 5, 2021 Award as final with respect to the discrete issues fully resolved by Stantec's Motions 1-4 and 6. Appellant represented to the Court that: "Plaintiff moves to lift the Stay for the purpose of filing this Application of Vacation, ***which would be final as to these claims, if not lifted***." (Mot.Vac. 1 p. 4, ¶ 8, R. ___)(Emphasis added). Relying on this representation, the Court lifted the stay and entertained the Application to Vacate.

Issues not raised in proceedings below are not preserved for appeal. *Herron v. Century BMW*, 395 S.C. 461, 465-66, 719 S.E.2d 640, 642 (2011). Appellant did not argue in the Court of Common Pleas that the Award was not final. To the contrary, the Court lifted the stay based on

[7] Stantec previously raised an objection to the Panel's lack of authority to modify the award. (Opp. Reconsid.Mot. 2 pp. 6-7, R. __; Opp.Vac. 2 p. 5, R. __).

Appellant's representation that the Award was final. Therefore, Appellant is judicially estopped from arguing that November 5, 2021 Award was not final. *Quinn v. Sharon Corp.*, 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000) (judicial estoppel protects the integrity of the judicial process and the courts).[8]

II. Appellant Has Not Met the Burden for Vacating an Arbitration Award.

A. Standard of Review

A party seeking vacatur of an arbitration award has a high burden. Courts are necessarily deferential to arbitrators in service to arbitration's promise of speed and efficiency. *Group III Management, Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 150-52, 819 S.E.2d 781, 785-86 (Ct. App. 2018). In *Group III Management*, this Court held:

> Generally speaking, '[a]n award within the scope of submission is conclusive on fact issues and interpretation of law.'" "The award is presumptively correct, and '[i]t is the general rule that the courts will refuse to review the merits of an arbitration award.'" ***"[C]ourts defer to the arbitral panel both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'"*** "Otherwise, an arbitration award would signify 'the *commencement*, not the end, of litigation.'" … "[A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

Id. at 150 (emphasis added) (internal citations omitted).

A court's belief that the arbitrators erred, even wildly, is not a ground for vacating an arbitration award. *Id.* at 150-51 ("'…court may not overturn an arbitration award 'just because it believes, however strongly, that the arbitrators misinterpreted the applicable law'").

Nor is ambiguity a ground for vacatur. Requiring awards to be perfectly clear would chill arbitrators who attempt to explain the basis for their decisions. This Court explained:

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[8] If a motion to vacate filed before the resolution of the Geomembrane Claim is invalid, then both of Appellant's Applications were properly denied because they were filed before September 12, 2022, when Appellant withdrew the Geomembrane Claim. (9/12/22 E-mail, R. __).

> "Moreover, the arbitrators need not specify their reasoning or the basis of the award, ... so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'" "If a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." … Because "arbitrators need not give *any* rationale for an arbitration award, requiring their opinions to be 'free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions.'" "Therefore, 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" … On the contrary, the award 'should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached.'"

Id. at 151-52 (internal citations omitted).

Finally, to vacate an award for misconduct by refusing to hear evidence, the Court must find that "(1) the excluded evidence was so material to the arbitrator's decision that it denied fundamental fairness to the challenger; and (2) by clear and convincing evidence ... the arbitrator had no reasonable basis for his [or her] decision." *Hale v. Morgan Stanley*, 571 F. Supp. 3d at 879-80; *see also, Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 109, 333 S.E.2d 781, 788 (1985) (refusal to hear evidence must rise to the level of misconduct). The standard requires Appellant to identify specific evidence presented to and excluded by the Panel. *e.spire Communications, Inc. v. CNS Communications, Inc.*, 39 Fed. App'x 905, 909-10 (4th Cir. 2002) (court cannot determine materiality when excluded evidence is not identified).

Appellant failed to supply the Court with the many briefs and/or the evidence submitted to and considered by the Panel. Accordingly, neither this Court nor the Court below were positioned to find that Appellant met the high burden for vacating the Award.

B. The Panel Did Not Engage in Misconduct.

1. The Panel Appropriately Decided the Predicate Legal Question.

The Panel found against Appellant on the predicate legal question of whether Stantec had a duty to perform pre-bid drainage design and pre-bid Wall 32 design. *Spence v. Wingate*, 395

S.C. 148, 160, 716 S.E.2d 920, 926 (2011) (existence of duty is an issue of law for the court). This ruling was not a product of alleged unfairness as Appellant urges.[9]

Rather than being treated unfairly, Appellant treated Stantec unfairly. Appellant alleged negligent drainage and wall design in its 2018 complaint. (Cmplt. ¶¶ 42.f and 42.m, R. ___). However, Appellant's expert appropriately assigned responsibility to CECS and its subconsultants, T.Y. Lin and ECS, not Stantec. (OCL Aff. ¶¶ 10.j and 10.m, R. __). Two years later, in November 2020, when Stantec asked Appellant to state with specificity each error or omission Appellant contended was made by Stantec, Appellant responded:

> …CECS and Stantec negotiated and entered into a subconsultant agreement outlining Stantec's design responsibilities, and it is unclear whether Stantec, CECS, or both are responsible for any errors or omissions made in the work performed under that agreement. (Int. Ans. No. 2, R. __).[10]

Whether Appellant was uninformed about Stantec's responsibilities or ignored them, Appellant should not have sued Stantec. South Carolina law does not countenance "shoot first, ask questions later" litigation. *Ex Parte Gregory*, 378 S.C. 430, 434 and 437-38, 663 S.E.2d 46, 49-50 (2008). Appellant could have sued CECS, which had contractual responsibility for the entire design, and soon after taken the deposition of CECS on the narrow topic of the services CECS expected Stantec to perform. Instead, Appellant sued Stantec and, for nearly three years, delayed taking discovery on the predicate question of Stantec's design scope. This unjustifiably embroiled Stantec in expensive and protracted litigation.

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[9] The Panel granted Stantec's motion on the post-award claim based on the admission of Appellant's expert that Appellant was not damaged. (Award p. 4, R. __).

[10] Because the Court may wonder how Stantec knew which claims to defend, it is important to explain that, facing Stantec's January 2021 motion for summary judgment, Appellant asserted that Stantec was "involved" in the drainage and Wall 32 claims although the basis of Stantec's alleged liability was not articulated.

Finally, in August 2021, Appellant deposed CECS who confirmed that neither the drainage claims nor the Wall 32 claims arose from services that CECS assigned to Stantec. (Opp.Vac 1 p. 9-10, n. 4 and n. 5, R.___). Because CECS confirmed that Stantec was not responsible for these services (consistent with Dr. O'Connell's 2018 affidavit), the Panel decided the purely legal question of duty in Stantec's favor. There was little else the Panel could do because "[w]here the parties [to a contract] have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." Restatement (Second) of Contracts § 201.

2. The Panel Did Not Refuse to Hear Evidence.

The Panel explicitly stated in its orders that it considered all evidence presented to it. (Award p. 1, R. __; 12/8/21 Order, R. ___; 3/24/22 Order p. 1, R. ___). Appellant has not identified specific evidence that it presented to the Panel that the Panel refused to consider as required under 9 U.S.C. § 10. Appellant has not established misconduct.

Appellant cites cases in which an arbitrator refused to consider evidence specifically identified and presented by a party. *United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (arising from refusal to hear evidence actually presented by a party and refusal to allow party to submit briefs); *Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Loc. 901*, 763 F.2d 34, 39-40 (1st Cir. 1985)(arising from the effective exclusion of a witness who was prepared to provide specific testimony of wrongdoing and disregarding a transcript of the witness' prior sworn testimony); *Attia v. Audionamix Inc.*, 2015 WL 5580501(S.D.N.Y. 2015) at * 6 et seq. (vacating award based on spoliation sanctions when arbitrator refused to consider an affidavit that "directly refuted Respondent's spoliation claims").

Unlike in the cited cases, Appellant has not identified any specific evidence that the Panel refused to hear, let alone pertinent and material evidence. Instead of identifying any evidence that

the Panel excluded, Appellant argues that a summary judgment motion cannot be considered before close of discovery, an argument that has no basis in the rules or the law.

3. Summary Judgment Prior to Close of Discovery Is Permissible.

Arbitrators are permitted to grant summary judgment before close of discovery. The Arbitration Agreement did not prohibit filing summary judgment motions before the close of discovery. (Arb. Agmt., R. __). In addition, the Amended Scheduling Order authorized the filing of dispositive motions on or before January 31, 2022. (Sched. Ord. ¶ 5, R. __).

Long-established rules permit summary judgment motions prior to the close of discovery. For example, Rule 56, SCRCP permits a defendant to file such a motion "at any time." *See also*, e.g., *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003) (summary judgment motion filed four months after the complaint was properly granted); *Pony Computer, Inc. v. Equus Computer Systems of Missouri, Inc.*, 162 F.3d 991, 996 (8th Cir. 1998) (summary judgment granted before close of discovery).

Appellant cites a series of cases that do not support its position. In addition to the cases discussed above, Appellant cites: *Prudential Sec., Inc. v. Dalton*, 929 F. Supp. 1411, 1413 (N.D. Okla. 1996)(vacatur for failing to accept allegations as true when dismissing action for failure to state a claim); *Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975) (five person arbitral board exceeded its authority by ruling on a portion of the arbitration that had been severed and for which no evidence had been taken); *Turoff v. Itachi Cap.*, 527 P.3d 436, 438 (Colo. Ct. App. 2022)(vacating award after arbitrators instructed *pro se* litigant to consult counsel and then refused to postpone hearings to permit new counsel to take discovery and get up to speed). None of these cases prohibit summary judgment prior to the close of discovery.

4. The Panel Was Justified in Denying Appellant's Request for Delay.

Summary judgment cannot be delayed for a fishing expedition. If the Court were to hold that summary judgment is not possible in arbitration until plaintiff unilaterally decides to cut bait, it would encourage baseless lawsuits and undermine arbitration's promise of efficiency. *White v. Preferred Research, Inc.*, 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993) (arbitration is an alternative means of resolving a dispute "without the cost and delay of a lawsuit").

Limitations on discovery do not require vacatur. *Rintin Corp., S.A. v. Domar Ltd.*, 374 F. Supp. 2d 1165, 1170 (S.D. Fla. 2005) ("Plaintiff has not shown how the discovery it claims it was unable to obtain is relevant or would have affected the Award in any material respect. Moreover, discovery is not guaranteed in arbitration and arbitrators have broad discretion to grant or deny the ability to obtain discovery"); *Freeman v. Citibank, N.A.*, 2015 WL 13777266 (N.D. Ga. 2015) (refusing discovery does not equate to refusing to hear evidence); *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002) (vacatur denied despite refusal to reopen discovery); *see also, Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991) (vacatur denied where movant did not explain materiality of proposed testimony); *ALS & Associates, Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 182 (D. Mass. 2008)(same).

In *Rintin*, *Schmidt* and *ALS*, the Court found that a party seeking delay must explain the materiality of discovery that it wants. In the related context of Rule 56(f), SCRCP, this Court rejects Appellant's argument that granting summary judgment prior to the close of discovery deprives a party of a full and fair opportunity to present its case. *Guinan v. Tenet Health Systems of Hilton Head, Inc.*, 383 S.C. 48, 677 S.E.2d 32 (Ct.App. 2009). In *Guinan*, this Court held:

> Nonetheless, the nonmoving party must demonstrate the ***likelihood*** that further discovery will uncover ***additional relevant evidence*** and that the party is 'not merely engaged in a "fishing expedition."' … In *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439–40 (2003), ***our supreme court rejected Dawkins'***

> ***"argument that summary judgment was premature because they did not have a full and fair opportunity for discovery."*** A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

Id. at 54-55 (2009) quoting *Dawkins v. Fields*, 354 S.C. 58, 71 (2003) (emphasis added). Here, Appellant failed to explain what additional relevant evidence would likely be obtained or why it had not obtained it in three years of litigation. The question of whether a duty existed is a predicate legal question, and to the extent any discovery was required, Appellant had a fair opportunity to conduct it. In fact, Appellant confirmed Stantec's lack of duty by questioning CECS' designee on the topic of Stantec's assigned scope of services. (Opp.Vac 1 p. 9-10, n. 4 and n. 5, R.__).[11]

Appellant argued that the Panel should have deferred ruling on the motion for summary judgment because *Appellant's own expert*, Dr. O'Connell, had not yet been deposed. Appellant argued:

> More significantly, Dr. O'Connell has not been deposed – undoubtedly, many of the issues raised in Stantec's Motion could be addressed during Dr. O'Connell's deposition and it is likely that [his] deposition testimony would reaffirm that disputes of material fact preclude summary judgment. (Opp.Vac. 1, p. 8, R. __)

By claiming unfairness because its expert's deposition had not occurred, Appellant exposed its inability to articulate a basis for delay. Dating back three years, Dr. O'Connell had signed multiple affidavits and issued multiple reports. It is implausible that he had not already provided his opinions. However, if Dr. O'Connell had anything material to add, he should have

[11] Rule 56(f), SCRCP is not specifically applicable to this appeal. The Court's review of arbitrator's action is narrower than the review of trial court decisions. However, this Court has rejected claims of unfairness based on self-serving, unsworn requests for delay. *Covil Corporation by and through Protopapas v. Pennsylvania National Mutual Casualty Insurance Company*, 436 S.C. 85, 91, 870 S.E.2d 191, 194-95 (Ct.App. 2022)(unsworn, self-serving assertion of need for more time is insufficient).

done so by affidavit. *Matter of Estate of Smith*, 419 S.C. 111, 122, 796 S.E.2d 158, 163 (Ct.App. 2016)(Few, A.J. concurring). Further, Dr. O'Connell could not opine about Stantec's duty because experts are not competent to testify regarding issues of law.[12] *Dawkins v. Fields*, 354 S.C. at 66. Finally, Appellant argued that the expert deposition would "reaffirm" that factual disputes existed. However, summary judgment cannot be postponed to receive cumulative information. *Alphonse Hotel Corporation v. Tran*, 828 F.3d 146, 151 (2d Cir. 2016).

Appellant's contention that judgment should be postponed until the conclusion of the deposition of *Appellant's* corporate designee, Kris Edelberg, also demonstrated lack of seriousness in Appellant's request for delay. If Edelberg possessed knowledge that would create a dispute of fact on motions 1-4 and 6, Edelberg would have prepared and submitted an affidavit. In fact, Appellant submitted an affidavit from Edelberg on Motion 5. (Edelberg Aff., R. __).

The Panel was justified in concluding that Appellant's professed need for a delay was conclusory, ill-founded, and purely dilatory. *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 131, 591 S.E.2d 643, 646 (Ct.App. 2004) (rejecting claim for delay based upon the hope of developing "speculative deposition evidence"); *International Surplus Lines Ins. Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 905 (10th Cir. 1995) (conclusory assertions of need for discovery are insufficient to delay summary judgment); *Pony Computer, Inc. v. Equus Computer Systems of Missouri, Inc.*, 162 F.3d 991, 996 (8th Cir. 1998) (summary judgment will not be delayed for an "unbounded fishing expedition"). Appellant did not describe the evidence that was likely to be elicited, how it mattered, and why it could not have been obtained earlier. Moreover, given the

[12] *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112-14, 410 S.E.2d 537, 543-44 (1991), cited by Appellant, did not involve a predicate legal question such as the existence of a duty. Instead, the Court found that summary judgment was premature, noting the complexity and hardship of proving causation in toxic tort cases and based on a letter from an expert describing particular tests and analysis that would provide relevant evidence of causation.

issues, the Panel found that there was no likelihood that such evidence would be developed. (Award p. 2, R. __). Appellant did not clearly and convincingly show that the Panel engaged in misconduct by rejecting Appellant's request for delay.[13] *Hale v. Morgan Stanley*, 571 F. Supp. 3d 872, 879-80 (S.D. Ohio 2021).

5. Appellant Was Not Guaranteed "Full and Complete Discovery."

Appellant misrepresents that the Panel disregarded the parties' "Agreement to conduct full and complete discovery." (Brief p. 14). The Agreement to Arbitrate unremarkably provides that "the parties agree that discovery will be conducted in the arbitration, with the scope and process subject to further agreement or by direction of the arbitration panel." (Arb. Agmt. ¶ 9, R. ___). Appellant's argument that this provision guaranteed Appellant limitless discovery which the Panel was powerless to control stretches credibility beyond its elasticity. Instead, by empowering the Panel to "direct" the "scope and process" of discovery, this provision authorized the Panel to impose limits on discovery. *See also*, AAA Rules L-4(d) ("the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate") and AAA Rules R-33(b) ("[t]he arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute…"). The Panel's conclusion that the predicate legal question of duty was ripe for decision was well within its discretion.

6. The Panel Did Not Disregard AAA Rule 34 and Appellant Waived Any Objection.

The Panel did not disregard AAA Rule 34. Rule 34 provides that "Upon prior written application, the arbitrator may *permit* [dispositive motions]." This provision was not violated. Rather, it was satisfied by the agreed-to Amended Scheduling Order which permitted the parties

[13] Appellant also argues that summary judgment was premature because the deadline for adding claims was still 15 days away. (Brief p. 12). The potential to add hypothetical claims (that never were identified or added) does not restrict the Panel's authority to rule on actual claims.

to file dispositive motions on or before January 31, 2022. (Sched. Order ¶ 5, R. __) In fact, paragraph 5 of the Amended Scheduling Order distinguished between dispositive motions and other applications by requiring the parties to confer in good faith before filing the latter, but not the former. *Id. at* ¶5. In short, the parties agreed that dispositive motions could be filed.

Appellant did not object in writing and waived this argument. AAA Rule 42[14] ("Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object"). To the contrary, after receiving Stantec's motions, the Panel set a time for Appellant to respond that was shorter than permitted in the Amended Scheduling Order. Appellant asked to be provided the full time for response without raising AAA Rule 34. (E-mail, R. __). *See also, Davis v. Producers Agricultural Insurance Company*, 762 F.3d 1276, 1287 (11th Cir. 2014)(waiver of the requirements of AAA Rule R-41 by failing to object); *see also, e.spire Commc'ns, Inc. v. CNS Commc'ns*, 39 F. App'x 905, 911 (4th Cir. 2002)(vacatur not warranted "on the basis of a procedural flaw that could have been, and likely would have been, rectified by the arbitral panel had the aggrieved party brought the error to the panel's attention").

III. The Panel Did Not Manifestly Disregard the Law.

A. Standard of Review

In addition to the grounds set forth in 9 U.S.C. § 10, South Carolina recognizes manifest disregard of the law as a ground for vacatur. Proving that an arbitrator knew the law but misapplied it does not equate to manifest disregard of the law. *Harris v. Bennett*, 332 S.C. 238, 244-45, 503

[14] *See*, https://www.adr.org/sites/default/files/ConstructionRules_Web_0.pdf. The Court can take judicial notice of the rules. *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 491, 593 S.E.2d 480, 483 n. 3 (Ct. App. 2004).

S.E.2d 782, 786 (Ct. App. 1998) ("Our Supreme Court has stated this non-statutory ground requires something more than a mere error in construing or applying the law")**.**

The federal district court for the Southern District of New York described the standard in *Landmark Ventures, Inc. v. InSightec, Ltd.*, 63 F. Supp. 3d 343 (SDNY 2014) as follows:

> Under the manifest disregard standard, an arbitration award may be vacated if an arbitrator is fully aware of the existence of a clearly defined governing legal principle, but refuses to apply it, in effect, ignoring it. The manifest disregard standard is severely limited, highly deferential, and confined to those exceedingly rare instances of ***egregious impropriety*** on the part of the arbitrator. A party objecting to an arbitration award on the grounds of manifest disregard of the law must establish that the law allegedly ignored was clear, improperly applied, and led to an erroneous outcome, and that the arbitrator not only knew of the law but ***intentionally disregarded it***.

Id. at 355 (emphasis added) (internal citations omitted). *See also, Group III Management, Inc. v. Suncrete of Carolina, Inc*., 425 S.C. at 154-56.

B. The Panel Did Not Intentionally Ignore the Summary Judgment Standard.

Appellant's contention that the Panel intentionally disregarded the very summary judgment standard that it applied is illogical. Appellant acknowledges that the Panel denied multiple motions because material facts were in dispute, an irrefutable indicator that the Panel did not intentionally disregard this standard. Appellant's actual complaint is that the Panel erred by finding no material facts in dispute. Knowing the law and erring does not equate to manifest disregard of the law. *Harris v. Bennett,* 332 S.C. 238, 244-45 (Ct. App. 1998) ("Our Supreme Court has stated this non-statutory ground requires something more than a mere error in construing or applying the law").

To facilitate the argument that the Panel disregarded the summary judgment standard, Appellant attempts to compare two separate orders addressing factually different claims. Appellant attempts to conjure an inconsistency between the Panel's treatment of Stantec's Motion regarding Wall 32 filed on September 13, 2021 and its treatment of a subsequent motion regarding

Stantec's Bridge 11 design filed on December 10, 2021. Inconsistency is not a ground for vacatur even if it occurred.[15] The only value of the January 19, 2022 order is that, by finding disputed issues of fact prevented summary judgment, the Panel demonstrated that it applies, and does not manifestly disregard, the summary judgment standard. Even if the Panel erred in its conclusion regarding whether material facts were disputed in any of the motions it decided, such an error does not support a finding of manifest disregard of the law. *Id*.

C. The Panel's Clarification Corrected a Typographical Error and Was Not a Substantive Change.

Finally, Appellant misrepresents the Panel's March 24, 2022 clarification order stating that the Panel "remove[d] the MSE Walls from the list of items where it previously had stated it was 'undisputed' that Stantec did not provide pre-award services." Appellant then argues that, by doing so, the Panel implicitly conceded that summary judgment was improper. (Brief p. 20).

The November 5, 2021 Award explained the substantive basis for the ruling on Stantec's Motion 4 as follows: "Regarding item 4…***while Stantec performed some pre-award services relating to MSE walls***, it is undisputed by the evidence that Stantec was not retained by CECS to provide [the services relevant to the specific claim]." (Award p. 3, R. __)(Emphasis added). Therefore, the Panel always believed that Stantec had some pre-bid services relating to MSE walls and that those services were not material to its decision.

The March 24, 2022 clarification corrected a typographical error that was inconsistent with the Panel's substantive determination of the Wall 32 claim, described in the preceding paragraph. In the November 5, 2021 Award, prior to discussing the substantive basis for its ruling on Motion 4, the Panel inadvertently stated "On items 1, 2 ***and 4***, it is undisputed that Stantec did not provide

[15] The record does not include the Bridge 11 motion and opposition so the Court cannot evaluate the claim of inconsistency or whether the Panel's January 19, 2022 order was correct.

pre-award services…" (Award p. 2, R. __). At the request of Appellant, the Panel later clarified that this sentence was intended to say "On items 1 and 2, it is undisputed that Stantec did not provide pre-award services…" making it consistent with the Panel's substantive ruling on Motion 4. (3/24/22 Order p. 1, R. __). The substance of the Award was unchanged. Appellant's argument that the correction of a typographical error was an implicit concession that summary judgment was improper is obviously incorrect. The Panel corrected the typo by deleting the single digit "4" from one sentence and denied Appellant's motion to reconsider -- again. *Id.*

CONCLUSION

For the foregoing reasons, Respondent, Stantec Consulting Services Inc., respectfully requests that the Appeal be DISMISSED as untimely or, alternatively, that the Court of Common Pleas Order Denying Appellant's Motion to Vacate be AFFIRMED.

Respectfully submitted,

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