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.

FINAL BRIEF OF APPELLANT

C. Mitchell Brown
Blake T. Williams
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Matthew E. Cox
Smith Currie & Hancock, LLP
5726 Westpark Dr., Ste. 200
Charlotte, NC 28217

Attorneys for Appellant Flatiron-Zachry, a Joint Venture

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

Statement of Issues on Appeal

1. Did the circuit court err by refusing to vacate the Arbitration Panel award granting summary judgment in favor of Stantec where the award was premature, directly conflicted with subsequent orders issued by the Panel and was otherwise arbitrary, and demonstrated the Panel's manifest disregard for the law?

Statement of the Case and Facts

This dispute arises out of the design and construction of part of the 85/385 Gateway Project in Greenville, South Carolina, which was a project involving construction of roads and large bridges. Flatiron-Zachry, a Joint Venture ("FZJV") brought this action seeking recovery of nearly $60 million dollars in damages caused directly by the designer Defendants', including Respondent Stantec Consulting Services Inc.'s ("Stantec"), negligent and deficient performance of their engineering design work. (*See generally* Am. Compl.; R. 54.) The lead contractor tasked with assembling a design-build team was Defendant Civil Engineering Consultant Services ("CECS"). (*Id*. ¶¶ 9-13; R. 57-58.) Stantec was one of CECS's subcontractors and did not have a direct contractual relationship with FZJV. (*See id.*)

In November of 2019, the parties jointly agreed to stay the circuit court proceedings and have the dispute compelled to arbitration. (Joint Mot. & Agreement to Arbitrate; R. 339.) The parties thereafter proceeded to arbitration. The genesis of the present appeal was the decisions of a panel of three arbitrators (the "Arbitration Panel" or "Panel"), who FZJV asserts made a series of conflicting orders that exceeded the scope of their authority, manifestly disregarded the law, and deprived FZJV of the opportunity to develop and present material evidence.

The timeline of events leading to this appeal is as follows:

9/14/2018 – FZJV files suit in the Court of Common Pleas for Greenville County against Respondent and the other above-captioned defendants.

11/18/2019 – All parties submit a joint motion to stay the case and arbitrate. (*See* Joint Motion & Agreement to Arbitrate; R. 339.) The parties agreed that the Federal Arbitration Act ("FAA") governed and that the American Arbitration Association ("AAA") Construction Rules would apply.

11/19/2019 – The Circuit Court grants the joint motion.

1/11/2021 – Without making a prior written application or obtaining approval from the Arbitration Panel to file a dispositive motion as required by AAA

Construction Rule 34[1], and prior to any depositions being taken, Stantec moves for summary judgment.

2/9/2021 – The Arbitration Panel finds that Stantec's motion for summary judgment was premature and could be brought again at the **close** of discovery **and in conformance with the other provisions of the current Scheduling Order** in the arbitration.

5/17/2021 – The Arbitration Panel issues its Amended Scheduling Order. (Am. Sch. Order; R. 295)

9/13/2021 – Stantec moves for summary judgment a second time, again without requesting leave to submit a dispositive motion or obtaining prior approval from the Arbitration Panel as set forth in Construction Rule 34. Discovery was still ongoing and no depositions had been taken.

11/5/2021 – The Arbitration Panel issues an Order granting Stantec's motion for summary judgment on 5 of 6 claims (one of which FZJV had withdrawn), while denying summary judgment on the sixth. (*See* Arbitration Panel's Nov. 5, 2021, Order; R. 481.)[2] At this time, discovery was still ongoing, with depositions of corporate representatives having just begun.[3] Two of

[1] Available at: https://www.adr.org/sites/default/files/ConstructionRules_Web_0.pdf.

[2] The Arbitration Panel stated in its November 5, 2021, Order that summary judgment on FZJV's two "MSE Wall claims" was proper because there was no dispute of material fact as to Stantec's contractual obligations. FZJV's operative Complaint contended that the Defendants provided an improper design recommendation "regarding the applicable factor for structural backfill requirements for the MSE walls and failing to provide any design guidance on shoring requirements for MSE Wall 32." (Am. Compl. ¶ 25(g); R. 61.) The Panel found that Stantec was not retained by Defendant Civil Engineering Consultant Services ("CECS") to provide input on the Mechanically Stabilized Earth Retaining Wall ("MSE" Wall") design. Thus, despite expert opinion evidence to the contrary supporting the existence of a disputed material fact, the panel held that "for item 4 [MSE Wall claims], it is undisputed that Stantec did not provide pre-award services." (Arbitration Panel's Nov. 5, 2021 Order; R. 481.) Yet, the Panel acknowledged later in the same Order that "***Stantec performed some pre-award services relating to the MSE wall***." (*Id.*) The Panel did not explain whether it was granting summary judgment as to both of FZJV's claims related to the MSE Walls in this internally contradictory order. The first MSE Wall claim arose out of Stantec's failure to adequately account for the necessary shoring at MSE Wall 32 in its design efforts. The other arose out of Stantec's participation in the general MSE wall reinforcement (or "strap length") design that resulted in significant additional excavation and backfill once the design corrections were made.

[3] FZJV expected that the following depositions would occur, at a minimum, prior to the Panel's consideration of any dispositive motions: (1) completion of CECS's 30(b)(6), (2) completion of

those claims are at issue in this Appeal – FZJV's claims arising out of Stantec's failure to satisfy the professional engineering standard of care regarding its design efforts on shoring for the MSE walls, and Stantec's failure to satisfy the professional engineering standard of care regarding its design efforts on the necessary MSE wall reinforcement requirements.

11/24/2021 – FZJV submits a motion to clarify or reconsider to the Arbitration Panel.

12/8/2021 – The Arbitration Panel issues an order summarily affirming its grant of summary judgment and denying FZJV's motion to clarify without explaining the internal contradiction of its prior Order. (*See* Arbitration Panel's Dec. 8, 2021, Order on Motion to Clarify; R. 546.)

12/10/2021 – Stantec files another summary judgment motion on the remaining (sixth) claim.

1/19/2022 – For a second time, the Arbitration Panel denies Stantec's motion on the sixth claim. (*See* Arbitration Panel's Jan. 13, 2022, Order; R. 160.)[4]

2/9/2022 – FZJV timely files a motion to vacate under 9 U.S.C. § 12 of the FAA with the Court of Common Pleas. (FZJV's Mot. to Vacate; R. 141.)

3/15/2022 – The Court of Common Pleas issues an Order denying the motion to vacate. (Court's Mar. 15, 2022, Order; R. 8.)

3/18/2022 – FZJV submits a second motion to clarify or reconsider to the Arbitration Panel due to its inconsistent and contradictory and ambiguous rulings on summary judgment.[5]

FZJV's 30(b)(6), (3) FZJV's expert witness, (4) Stantec's expert witness, (5) Stantec engineer Betty Watson, and (6) 30(b)(6) of ECS Carolinas, LLP. (FZJV's Mot. to Vacate p.9; R. 149)

[4] The remaining claim concerned design details relating to bridge barrier conduit and geomembrane at bridge abutments. In this Order, the Panel again denied summary judgment to Stantec, rejecting its argument that "its motion should be granted because it performed work that CECS requested and nothing more." (Arbitration Panel's Jan. 13, 2022, Order; R. 160.) The panel reasoned that this "does not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care." (*Id.*) The panel found that, as a result, "these issues involve questions of material fact that are in dispute." (*Id.*) The panel likewise rejected Stantec's statute of limitations argument, citing an affidavit submitted by FZJV stating it did not discover that the geomembrane was not included in the final plans until September 2016, and thus there was a "genuine issue of material fact on when a reasonable design/builder should have discovered the claim related to the geomembrane in the bridge abutment." (*Id.*)

[5] Stantec submitted two motions based on an identical legal argument (that it cannot be held liable for design errors relating to any work not required of it in its subcontract with CECS), yet the Panel

3/24/2022 – The Arbitration Panel issues an Amended Order in which it reaffirmed its summary judgment rulings against FZJV made on November 25, 2021 and stated it was declining to further reconsider those rulings, yet which made substantive changes to its prior order on summary judgment, including granting summary judgment to Stantec on an additional basis not before stated. FZJV's sixth claim remained viable. (*See* Arbitration Panel's Mar. 24, 2022, Order on Second Motion to Clarify or Reconsider; R. 158.)[6]

FZJV timely filed a motion to vacate the March 24, 2022, Order with the Court of Common Pleas on June 22, 2022. (FZJV's Mot. to Vacate; R. 141.) Stantec did not move to vacate any of the Arbitration Panel actions or Orders. In its motion to vacate, FZJV contended that the Court should vacate the summary judgment arbitration award as to the first five claims because the Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law. Specifically, FZJV argued that the Arbitration Panel: (1) refused to hear material evidence by issuing an award before the parties conducted meaningful discovery; (2) disregarded the parties' Agreement to Arbitrate, which contemplated full discovery; and (3) manifestly disregarded the law.

---

made two opposite and inconsistent applications of the law– *i.e.*, if material facts exist regarding performance of engineering services, then summary judgment is improper regardless of whether a party is performing a task which it was contracted to perform. And the Panel's reasoning completely ignored the lack of any *contractual* cause of action against Stantec. FZJV's claims against Stantec arose out of professional negligence and Stantec's alleged failure to provide its services with the requisite standard of care. Simply put, a disputed issue of material fact was what work Stantec *actually* performed, not merely what work it contracted with CECS to perform. The Panel recognized this important distinction in its January 19, 2022, Order but failed to recognize it in its prior contradictory Orders.

[6] Specifically, the Panel held that its November 5, 2021, Order should have omitted the MSE Wall claims from the issues which it stated were "undisputed," yet it nevertheless affirmed summary judgment in FZJV's favor on the MSE Wall claims. The Panel also confirmed, for the first time, that the initial order intended to grant summary judgment as to both of FZJV's MSE Wall claims against Stantec.

The circuit court held a hearing on FZJV's motion on September 22, 2022, and issued an Order denying the motion without explanation on October 6, 2022. (*See* Sept. 22, 2022 Hr'g Tr.; Court's Oct. 6, 2022 Order; R. 98; 6.)

On October 17, 2022 FZJV timely filed a motion to reconsider the circuit court's denial of the motion to vacate. (FZJV's Mot. to Reconsider; R. 129.) The court denied this motion via Form 4 Order without explanation on June 21, 2023. (Court's June 21, 2023 Order; R. 3.) This appeal followed. (FZJV's Notice of Appeal; R. 346.)[7]

Standard of Review

FZJV acknowledges that courts generally play a limited role when reviewing the decisions of an arbitrator, and because the parties have contracted to have their disputes settled by an arbitrator rather than a judge, courts "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation." *Constellium Rolled Prod. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 739 (4th Cir. 2021). However, there ***are*** circumstances when court intervention is appropriate and necessary.

Pertinent here, under Section 10 of the Federal Arbitration Act, courts may vacate an arbitration award where:

> (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, *or in refusing to hear evidence pertinent and material to the controversy*; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) the arbitrators *exceeded their powers,* or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[7] On October 27, 2022, FZJV dismissed its claims against the other Defendants pursuant to a settlement.

9 U.S.C. § 10(a) (emphasis added).

In assessing whether an arbitrator's misbehavior or misconduct prejudiced the rights of the parties under § 10(a)(3), courts "ask whether the parties received a fundamentally fair hearing." *Move, Inc.*, 840 F.3d at 1158; *see also Oldcastle Precast, Inc. v. Liberty Mut. Ins. Co.*, 838 F. App'x 649, 651 (2d Cir. 2021) ("Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review.").

Under § 10(a)(4), Arbitrators exceed their "authority by failing to provide an award in the form required by an arbitration agreement." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011). Hence, the arbitrators must not violate the arbitration agreement terms. Further, arbitrators exceed their authority "when the award is completely irrational or exhibits a manifest disregard of the law." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003) (en banc). Thus, a court may vacate an arbitration decision pursuant to § 10(a)(4) where the arbitrator "strays from interpretation and application of the agreement and effectively dispense[s] h[er] own brand of industrial justice." *Id.* (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001)).

In addition to the statutory grounds established by the FAA, South Carolina case law provides for an additional, non-statutory ground for vacatur of an arbitration decision where it reflects "manifest disregard or perverse misconstruction of the law." *See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This "basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

On appeal from an order denying a motion to vacate, the appellate courts review the lower court's "legal conclusions *de novo* and its factual findings for clear error." *Constellium*, 18 F.4th at 739.

Argument

This Court should vacate the arbitration decision for three independent reasons, each of which warrants vacatur: (1) the Arbitration Panel refused to hear evidence material to the controversy rendering the proceedings fundamentally unfair; (2) the Panel exceeded its power and the scope of its authority and violated the parties' Agreement to Arbitrate, also acting arbitrarily; and (3) the Panel manifestly disregarded and misconstrued applicable law. Specifically, this Court should reverse and vacate because the Arbitration Panel:

- Permitted Stantec to submit procedurally defective summary judgment motions in violation of the agreed-upon AAA Construction Arbitration Rules;
- Refused to hear evidence material to the controversy;
- Granted Stantec's procedurally defective motion (in violation of the parties' Agreement to Arbitrate since discovery was still ongoing);
- Manifestly disregarded the law in granting Stantec's motion;
- Issued conflicting and contradictory (and thus arbitrary) orders regarding FZJV's claims against Stantec; and
- Issued orders denying summary judgment motions submitted by other Defendants that conflicted with its order in Stantec's favor, thus again demonstrating the arbitrary nature of its Order favorable to Stantec.

I. The Arbitration Panel refused to hear evidence material to the controversy by issuing an award before the parties conducted meaningful discovery.

The Arbitration Panel refused to hear evidence material to the controversy and therefor vacatur is warranted under § 10(a)(3) of the FAA.

The FAA required the Panel to hear all evidence "pertinent and material" to the controversy. 9 U.S.C. § 10(a)(3). The Panel was similarly required by the rules governing the underlying arbitration to ensure a fair hearing, specifically when managing discovery. *See* AAA Construction Arbitration Rule 24(a) ("The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses."); *see also id.* at Rule 33(a) ("The arbitrator has the discretion to vary [the proceedings], provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.").

Where the parties' agreement to arbitrate provides that the certain rules govern, such as the AAA Construction Rules applicable here, the arbitration proceeding must comport with those rules. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 384, 759 S.E.2d 727, 734 (2014); *see also, e.g.*, *Hernandez v. MicroBilt Corp.*, No. CV2104238FLWLHG, 2022 WL 16569272, at *8 (D.N.J. Oct. 25, 2022), *aff'd*, 88 F.4th 215 (3d Cir. 2023) ("Defendant cannot bypass the AAA's rules to which both parties have agreed to be bound."); *Diemaco, a Div. of Devtek Corp. v. Colt's Mfg. Co.*, 11 F. Supp. 2d 228, 232 (D. Conn. 1998) ("When parties agree to arbitrate before the AAA and incorporate the Commercial Arbitration Rules into their agreement, they are bound by those rules . . . .").

If an arbitrator does not provide for a full and fair hearing as the AAA rules require, then "courts owe no deference" to such an arbitrator. *Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (citation omitted) (concluding arbitrator committed misconduct by failing to provide parties with full and fair hearing); *see also Hoteles Condado Beach v. Union De Tronquistas*, 763 F.2d 34, 38 (1st Cir. 1985) (holding that arbitrator's

refusal to consider a trial transcript submitted by one of the parties denied them "adequate opportunity to present its evidence and arguments"); *Prudential Securities, Inc. v. Dalton*, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) (finding arbitrator guilty of misconduct in making a final decision without hearing "evidence pertinent and material to the controversy").

In *International Union*, for example, the arbitrator told the parties to meet, gather information, negotiate further, and, if not resolved, present evidence and argument at an arbitration hearing. *See Int'l Union*, 232 F.3d at 390. The arbitrator then "issued his award without ever holding that hearing or affording the Union the opportunity to present the evidence it had been prepared to offer[.]" *Id.* The Fourth Circuit, in holding that the arbitrator had engaged in misconduct, noted that the arbitrator had made no findings that the Union's evidence was "cumulative," "irrelevant," or "immaterial," nor did the record show "that [the] evidence was, in fact, cumulative or anything less than highly material and relevant." *Id.*

The facts here are analogous. The Panel denied Stantec's first motion for summary judgment as premature based on the status of the proceedings and developing evidence, saying that summary judgment could not be pursued again until the close of discovery. This is analogous to the *International Union* arbitrator who instructed the parties to meet, gather information, and negotiate further before there could be a hearing. Yet, before the parties could move past the premature status of discovery that warranted denying Stantec's first motion, and before the close of discovery, the Panel inexplicably contradicted itself and issued its award granting Stantec's second motion for summary judgment. During the time between Stantec's motions the parties completed significant written discovery; however, at the time of Stantec's motion considerable discovery remained outstanding and was anticipated, including depositions of fact witnesses, expert witnesses, and corporate representatives. The claims were highly complex and technical,

involving many parties, necessitating millions of pages being exchanged in discovery and dozens of depositions. This was not a run of the mill case where discovery could be completed in six months.

International Union is directly analogous. In granting Stantec's motion, the Panel made no findings that the discovery it had cut short would be "cumulative," "irrelevant," or "immaterial" (same as in *International Union*). And, like *International Union*, where "the Union claimed that [the additional] evidence would demonstrate [certain] facts," the additional discovery that FZJV was deprived of the opportunity to conduct and present would have demonstrated—at the absolute very least—a genuine issue of material fact.

Had it been given the opportunity, FZJV would have conducted the following material discovery: (i) the conclusion of Defendant Civil Engineering Consulting Services, Inc.'s corporate representative deposition; (ii) the conclusion of FZJV's corporate representative deposition; (iii) the deposition of FZJV expert witness Dr. O'Connell; (iv) the deposition of Stantec's expert witness, Dr. Amoroso; (v) the deposition of Stantec's corporate representative; (vi) the deposition of Stantec's engineer, Betsy Watson; and (vii) the deposition of ECS's corporate representative.[8]

Based on that discovery, and if it had been given the opportunity to fairly present its case, FZJV would have presented pertinent and material evidence showing: (i) Stantec's involvement in, and responsibility for, the temporary shoring and design of the MSE Walls; (ii) that Stantec breached the standard of care by deviating from the Pre-Award design and is liable for such negligence and damages related thereto; and (iii) that Stantec's failure to timely provide the Post-Award temporary drainage design caused inefficiencies and related damages suffered by FZJV.

[8] ESC was another subconsultant of CECS and participated in the design efforts with Stantec on the MSE Wall reinforcement design.

The Arbitration Panel, however, deprived FZJV of the opportunity to present any of this pertinent and material evidence.

Furthermore, the Arbitration Panel's recognition in its January 19, 2022, Order that genuine issues of material fact were present as to FZJV's remaining claim against Stantec and its claims against CECS and ECS Southeast, Inc. further demonstrates that summary judgment was premature. (*See* Jan. 13, 2022 Order; R. 160.) As the Order explained, concerning the claims against Stantec: (1) factual issues remained as to whether certain work was performed and whether it was performed with the proper standard of care and (2) genuine issues of material fact existed regarding when a reasonable design/builder should have discovered the claim relating to the geomembrane. (*Id.*) Moreover, the Arbitration Panel also rejected arguments raised in CECS and ECS Southeast, Inc.'s motions for summary judgment, which solely concerned the statute of limitations, finding that there were genuine issues of material fact as to when FZJV learned of their alleged negligence. (*See id.*)

The Arbitration Panel's actions also ignored that the Parties' Agreement to Arbitrate provided that new issues may be sought to be arbitrated 180 days prior to the start of the final arbitration hearing. (Agreement to Arbitrate; R. 172.) Under the amended scheduling order, the final arbitration hearing was set for March 28, 2022. (Am. Sch. Order; R. 295.) September 28, 2021 was 180 days prior to that date. Stantec made its second summary judgment motion on September 13, 2021. Thus, this motion was patently premature under the parties' Agreement to Arbitrate since it was submitted even before the deadline to assert new issues in the arbitration.

Additionally, Sections 9(f) and (g) of the Amended Scheduling Order envisioned supplemental expert reports. (Am. Sch. Order; R. 300.) Hence, even under the Amended

Scheduling Order terms, the motion for summary judgment was premature as the time for possible supplemental expert opinions and reports had not run.

Therefore, FZJV was denied the opportunity to fairly present its case because the Panel: (1) refused to hear material evidence that it had not found to be "cumulative," "irrelevant," or "immaterial," and (2) the Panel subsequently acknowledged in its January 19, 2022 Award that FZJV's basis for opposition was warranted. Therefore, vacatur of the Arbitration Panel's summary judgment award is warranted. *Cf. Cofinco, Inc. v. Bakrie & Bros.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975) (holding that "[t]he fundamental right to be heard was grossly and totally blocked" where the arbitrator ruled after adjourning the merits portion of the arbitration, depriving the petitioner of the "opportunity to present any evidence"); *Attia v. Audionamix, Inc.*, No. 14-CV-706 (RMB), 2015 WL 5580501 (S.D.N.Y. Sept. 21, 2015) (vacating a $9 million award where the arbitrator, without a hearing, granted a sanctions motion and struck the petitioner's affidavit, even though it "directly refuted" the spoliation claims at issue); *Southgate Penthouses, LLC v. Mapp Const.*, 120 So. 3d 700 (La. 2013) (vacating arbitration award under Louisiana's statutory analog to 9 U.S.C. § 10 where the Arbitration Panel violated its own scheduling order by allowing a claimant to bring a new claim after the deadline expired); *Turoff v. Itachi Cap., Inc.*, 527 P.3d 436, 438 (Colo. Ct. App. 2022) (noting that the lower court vacated the arbitrator's award where the respondent had requested a continuance and identified the need for further discovery and was substantially prejudiced by the arbitrator's refusal of these requests).

For all these reasons, this Court should reverse the lower court and vacate the Panel's November 5, 2021, and March 24, 2022 Orders/Awards granting summary judgment in Stantec's favor on the pre-award MSE Wall design services.

II. The Panel exceeded its power by disregarding the parties' Agreement to conduct discovery.

The parties' Agreement to Arbitrate contemplated a full discovery process in arbitration. (*See* Agreement to Arbitrate ¶ 9; R. 174-175.) By disregarding the parties' Agreement to conduct full and complete discovery, the Panel exceeded its power, which also requires vacatur.

The Agreement states in mandatory language that discovery "**will**" be conducted. (*Id.*) The Agreement to Arbitrate only identified two caveats regarding discovery, neither of which is applicable here. First, the parties agreed that discovery would be subject to further agreement between the parties. There was no further agreement between the parties, and there certainly was no further agreement to cut off discovery just as it was beginning. Second, the Agreement provided that the scope and process of discovery may be subject to the direction of the Panel. Here, the Panel did not curtail or restrict the discovery scope or process (for example, by setting a deadline within which to complete discovery or by expanding the scope of document discovery). If there was any direction by the Panel regarding discovery, it was an implied direction to conduct ***more*** discovery considering it denied Stantec's initial motion for summary judgment as premature due to the ongoing nature of discovery.

Instead of upholding the parties' Agreement to Arbitrate, the Arbitration Panel issued a summary judgment award just as discovery was in its infancy. At the time the Panel granted Stantec's second motion for summary judgment, (1) discovery had not meaningfully progressed further than when the Panel denied Stantec's first motion as premature as to the issues central to FZJV's claims against Stantec,[9] and (2) discovery had not closed, despite the Panel expressly stating that summary judgment could not be properly sought by Stantec until the ***close*** of discovery.

[9] As noted above, the parties engaged in extensive written discovery during the time period between the motions. However, the posture was not materially different with regard to FZJV's

It is a well-established principle of South Carolina law that summary judgment is not appropriate where discovery is ongoing and the parties have not had a full and fair opportunity to complete discovery. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("Summary judgment is a ***drastic*** remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." (emphasis added)). This is especially so where the nonmoving party has demonstrated that further discovery would uncover additional relevant evidence and has been diligent in its pursuits. *See id.*; *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 113, 410 S.E.2d 537, 544 (1991) (same). As the Fourth Circuit has described it, "[s]ummary judgment before discovery forces the non-moving party into a fencing match without a sword or mask.'" *Goodman v. Diggs*, 986 F.3d 493, 500 (4th Cir. 2021) (quoting *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483–84 (4th Cir. 2014)).

Nothing in the parties' Agreement to Arbitrate indicated an intent to curtail the discovery process and restrict it from being anything other than the "full and fair" process that would have applied in circuit court. Likewise, nothing in the parties' Agreement manifested an intent to permit early dispositive motions before the parties had the opportunity to complete discovery. In fact, the parties' Agreement and its adoption of the AAA Construction Rules, demonstrated that the dispositive motions process would be ***more restrictive*** than in circuit court. Under AAA Construction Arbitration Rule 34, the parties should have only been permitted to submit dispositive motions upon a motion and a determination by the arbitrator that the "moving party has shown it is likely to succeed and the motion will dispose of or narrow the issues in the case." *Id.* This request/motion for leave to file a summary judgment motion early never happened here.

---

specific claims against Stantec, as FZJV had not yet had the opportunity to depose Stantec witnesses or representatives.

Arbitrator Gray, who signed the Order granting summary judgment, has recognized the significance of this rule. *See, e.g.*, Herbert H. Gray, III, E. Tyron Brown, R. Daniel Douglass, Motion Practice in Arbitration (2019). In that article, Arbitrator Gray recognized four things: First, that Rule 34 was a change from the former rule, which had previously allowed arbitrators to entertain dispositive motions without written application. *See id.* at 10. Second, Arbitrator Gray recognized that there "are several reasons for this cautious approach," including the fact that, "[i]n arbitration, the grounds for appeal are limited and an award is given deference by the courts to the point of allowing an arbitrator to make errors of law and still be affirmed. [And for that reason], an arbitrator is properly hesitant to cut the process short and deprive a party of the chance to present its case in an evidentiary hearing." *Id.* at 11. Third, Arbitrator Gray recognized that depriving a party of the opportunity to fully develop the facts of the case can leave an award vulnerable to challenge, including vacatur where the arbitrator or panel refused to hear evidence pertinent and material to the controversy. *See id.* Finally, Arbitrator Gray recognized that because "limited discovery and an expedited hearing are hallmarks of the arbitration process[,] [s]ummary disposition is less necessary and to some extent inconsistent with the nature of arbitration." *Id.* Despite the Panel's familiarity with the purpose behind this rule, it disregarded and failed to enforce its requirements.

The Rule comports with the purpose behind arbitration, which is "to promote efficiency and reduce costs." *Kelley v. Sallie Mae, Inc.*, No. 5:14CV138, 2015 WL 1650080, at *10 (N.D.W. Va. Apr. 14, 2015); *see also Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 409 (3d Cir. 2004) (finding that "arbitration's goal [is to] 'resolv[e] disputes in a timely and cost efficient manner.'"). The AAA Construction Arbitration Rules note that the arbitrator's authority relates to

the purpose of seeing to "fair, efficient and economical resolution of the case." AAA Construction Arbitration Rule 25.

An arbitrator or panel receives their authority only through the agreement of the parties to the arbitration. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (citation omitted) ("When, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, 'courts have no choice but to refuse enforcement of the award.'"). By failing to adhere to the AAA rules (i.e., AAA Rule R-34), the Panel stepped outside the scope of its authority and entertained a motion that it had no authority to entertain and issued an award that it had no authority to issue. The effect of this misconduct was the Panel's impermissible resolution of an issue beyond the scope of the parties' agreement. *See, e.g., Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 321 S.C. 70, 73, 467 S.E.2d 745, 747 (Ct. App. 1996) (citing *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 106, 333 S.E.2d 781, 786 (1985)) ("Arbitrators exceed their powers within the meaning of § 10(a)(4) of the FAA where their award resolves an issue that is not arbitrable because it is outside the scope of the arbitration agreement.").

Because the parties agreed to fully conduct discovery, the Panel exceeded its authority when it disregarded the parties' discovery agreement, effectively terminating the same discovery process prematurely before depositions demonstrating disputed issues of material fact could be taken. The Panel itself recognized the premature nature of a summary judgment motion in its first Order. It arbitrarily failed to do so as to the second summary judgment motion. Therefore, this Court should reverse the lower court and vacate the award.

III. The Panel manifestly disregarded the law.

In addition to the five statutory grounds for vacatur, South Carolina recognizes an additional, non-statutory ground of manifest disregard or perverse misconstruction of the law. "[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds*, 539 U.S. 444 (2003)); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). The focus is thus on whether the arbitrator refused to apply a legal principle of which he or she was aware. *See Gissel v. Hart*, 382 S.C. 235, 241–42, 676 S.E.2d 320, 323–24 (2009).

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012)). Six times throughout the Panel's original award granting summary judgment to Stantec, it referenced the standard of "genuine issue of material fact" as preclusive of summary judgment. Despite the Panel's knowledge and apparent understanding of this well-defined, explicit, and clearly applicable legal principle, it manifestly disregarded and refused to apply this standard.

As detailed above, the Panel initially granted summary judgment to Stantec on 5 of 6 claims, finding that there were no genuine issues of material fact. (*See* Arbitration Panel's Nov. 5, 2021 Order; R. 154.) As to the MSE Wall claims specifically, the Panel stated that it was

"undisputed" that "Stantec did not provide any pre award services" for this work,[10] and CECS's contract with Stantec did not anticipate that it would provide input for this design. (*Id.*) The Panel's subsequent Order on January 13, 2022, however, reached the opposite conclusion and found that there was a dispute of material fact. (Arbitration Panel's Jan. 13, 2022, Order; R. 160.) The Panel rejected Stantec's argument that "its motion should be granted because it performed work that CECS requested and nothing more." (*Id.*) The panel reasoned that this "does not address the factual issues of whether that work was performed or whether that work was performed with the proper standard of care." (*Id.*) These two Orders are in direct conflict with each other: the January 19, 2022, Order recognized that there was a dispute issue of material fact regarding what work Stantec actually performed, apart from what work Stantec contracted with CECS to perform; the Panel ignored that distinction in prior orders. The Panel's basis for subsequently denying summary judgment thus fundamentally undermines and conflicts with its prior ruling. If material facts exist regarding Stantec's performance of its engineering services, then summary judgment was improper, period.

It was not until FZJV submitted its second request for clarification or reconsideration of the Panel's summary judgment order that the Panel attempted to reconcile this conflict. Although the Panel's order on this motion stated that it was denying the motion to clarify, it nevertheless substantively modified the November 5, 2021, Order in two respects. First, it amended the Order to state that the Panel intended to grant summary judgment in Stantec's favor on the "Wall 32 issues . . . to include the shoring issues along with the strap length issues." (Arbitration Panel's March 24, 2022, Order; R. 158.) Second, it modified the Order to remove the MSE Walls from

[10] This is despite the Panel acknowledging later in the same Order that "Stantec performed some pre-award services relating to the MSE wall."

the list of items where it previously had stated it was "undisputed" that Stantec did not provide pre-award services. (*Id.*) Critically, by removing this from the list of "undisputed" facts, the Arbitration Panel implicitly conceded that disputed issues of fact made summary judgment improper on the MSE wall issues. Thus, the Panel demonstrated a manifest disregard of governing law regarding summary judgment motions, of which it was aware.

The end result of the Arbitration Panel's actions overall were: (1) an initial order denying summary judgment and indicating that such a motion was premature as discovery was ongoing, which was consistent with the parties' Agreement to Arbitrate and, since the motion was denied, did not matter with respect to the required "written application" permission that Stantec was supposed to seek prior to moving for summary judgment; (2) an order denying summary judgment on the sixth claim but granting summary judgment (which order was internally inconsistent as described above) on 5 of 6 of claims of FZJV against Stantec, despite discovery still being ongoing and despite no prior written application by Stantec seeking permission to file the second summary judgment motion; (3) a second order denying summary judgment on the sixth claim; and (4) a third amended order affirming summary judgment for 5 of 6 claims but adding new grounds. This Court should vacate the grant of summary judgment orders, as the motions for the same were all premature, made without proper written application permission prior to filing, demonstrate a manifest disregard of law, and because the Panel refused to hear evidence material to the controversy in contravention of the agreement between the parties and controlling law.

Conclusion

As detailed above, the Arbitration Panel refused to hear evidence material to the controversy, exceeded its power, and manifestly disregarded the law in granting summary judgment in Stantec's favor on 5 of the 6 claims that FZJV asserted against it. Therefore, this

Court should reverse the lower court and enter an Order vacating the Panel's November 5, 2021, and March 24, 2022, Orders/Awards.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
Blake T. Williams
S.C. Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

SMITH, CURRIE & HANCOCK LLP

Matthew E. Cox
SC Bar No. 16603
Email: mecox@smithcurrie.com
5727 Westpark Dr., Ste. 200
Charlotte, NC 28217
(704) 334-3459

Attorneys for Appellant Flatiron-Zachry, a Joint Venture

May 16, 2024