

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

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May 16 2024

SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Argument1

 I. Appellant’s motion to vacate was timely.2

 A. FZJV’s motion to vacate and this associated appeal were timely4

 B. *Elam* is inapposite to this situation7

 C. Equitable tolling should also apply to the extent the Court has any
 concerns about timeliness9

 II. Stantec’s arguments on the merits are unavailing11

 A. FZJV specifically identified the additional discovery that it was
 prohibited from conducting and its materiality12

 B. FZJV was not seeking an improper delay, it was seeking to obtain
 the discovery that it was entitled to obtain under the Agreement to
 Arbitrate and present material evidence in support of its claims13

 C. The cases cited by Stantec are distinguishable16

 III. The Court should reverse the lower court and vacate the arbitration award.19

Conclusion21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.</i> , 557 F. Supp. 2d 180 (D. Mass. 2008)	18
<i>Bazzle v. Green Tree Fin. Corp.</i> , 351 S.C. 244, 569 S.E.2d 349 (2002), <i>vacated and remanded on other</i> <i>grounds</i> , 539 U.S. 444 (2003).....	20
<i>Communications, Inc. v. CNS Communications, Inc.</i> , 39 F. App'x 905 (4th Cir. 2002)	16
<i>Cothran v. Brown</i> , 357 S.C. 210, 592 S.E.2d 629 (2004)	6
<i>Crawford Grp., Inc. v. Holekamp</i> , No. 406-CV-1274 CAS, 2007 WL 844819 (E.D. Mo. Mar. 19, 2007)	6
<i>Elam v. South Carolina Dept. of Trans.</i> , 361 S.C. 9, 602 S.E.2d 772 (1994)	7, 8
<i>Freeman v. Citibank, N.A.</i> , No. 314CV00067TCBRGV, 2015 WL 13777266 (N.D. Ga. Jan. 20, 2015)	17
<i>Great Games, Inc. v. South Carolina Dep't of Revenue</i> , 339 S.C. 79, 529 S.E.2d 6 (2000)	7
<i>Guinan v. Tenet Health Systems of Hilton Head, Inc.</i> , 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).....	13
<i>Hale v. Morgan Stanley</i> , 571 F. Supp. 3d 872 (S.D. Ohio 2021)	16
<i>Hall St. Assocs., L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576 (2008).....	9
<i>Hausman v. Hausman</i> , 199 S.W.3d 38 (Tex. Ct. App. 2006)	10
<i>Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.</i> , 386 S.C. 108, 687 S.E.2d 29 (2009)	10
<i>Jordan v. E.I. du Pont de Nemours & Co.</i> , 867 F. Supp. 1238 (D.S.C. 1994).....	14

<i>Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.</i> , 341 F.3d 987 (9th Cir. 2003)	9
<i>Landmark Ventures, Inc. v. InSightec, Ltd.</i> , 63 F. Supp. 3d 343 (S.D.N.Y. 2014).....	19
<i>Local 36, Sheet Metal Workers Int’l Ass’n v. Pevely Sheet Metal Co.</i> , 951 F.2d 947 (8th Cir. 1992)	5
<i>McKinney Restoration Co. v. Ill. Dist. Council No. 1 of the Int’l Union of Bricklayers & Allied Craftworkers</i> , 392 F.3d 867 (7th Cir. 2004)	5
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry</i> , 92 F. App’x 243 (6th Cir. 2004)	9
<i>Move, Inc. v. Citigroup Glob. Markets, Inc.</i> , 840 F.3d 1152 (9th Cir. 2016)	9, 10
<i>Nationwide Mut. Ins. Co. v. First State Ins. Co.</i> , 213 F. Supp. 2d 10 (D. Mass. 2002)	17
<i>NuVasive, Inc. v. Absolute Med., LLC</i> , 71 F.4th 861 (11th Cir. 2023)	9, 10
<i>Peabody Holding Co., LLC v. United Mine Workers of Am., Int’l Union, Unincorporated Ass’n</i> , 815 F.3d 154 (4th Cir. 2016)	5
<i>Schmidt v. Finberg</i> , 942 F.2d 1571 (11th Cir. 1991)	17, 18
<i>Shealy v. Aiken County</i> , 341 S.C. 448, 535 S.E.2d 438 (2000)	7
<i>Sloan v. S.C. Dep’t of Rev.</i> , 409 S.C. 551, 762 S.E.2d 687 (2014)	7
<i>State v. Oxner</i> , 391 S.C. 132, 705 S.E.2d 51 (2011)	7
<i>Trident Technical College v. Lucas & Stubbs, Ltd.</i> , 286 S.C. 98, 333 S.E.2d 781 (1985)	16
<i>Union Switch & Signal Div. Am. Standard, Inc. v. United Elec., Radio & Mach. Workers, Local 610</i> , 900 F.2d 608 (3d Cir. 1990).....	5

<i>Weimer v. Jones</i> , 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005).....	20
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Rules

AAA Construction Rule 34.....	14
Fed. R. Civ. P. 56.....	15
Fed. R. Civ. P. 56(f).....	13
Fed. R. Civ. P. 59.....	7, 8
Fed. R. Civ. P. 59(e)	4, 8

Statutes

9 U.S.C. § 10(a)(3).....	19
9 U.S.C. § 12.....	3, 4
S.C. Code Ann. § 15-36-100(B)	13

Other Authorities

Albert Bates Jr., R. Zachary Torres-Fowler, <i>The Intersection of International Arbitration and Construction Disputes: A Review of the 2019 Queen Mary University of London International Arbitration Survey</i> , <i>Constr. Law.</i> at 20, 28 n.84 (Spring 2020)	16
54 C. J. S. <i>Limitations of Actions</i> § 115 (2005)	10
J.S. “Chris” Christie, Jr., <i>Preparing for and Prevailing at an Arbitration Hearing</i> , 32 <i>Am. J. Trial Advoc.</i> 265, 267 (2008).....	14
Lewis L. Maltby, <i>Employment Arbitration and Workplace Justice</i> , 38 <i>U.S.F. L. Rev.</i> 105, 113 (2003)	16

ARGUMENT

Respondent Stantec Consulting Services, Inc.'s ("Stantec") brief relies on two fundamentally flawed arguments. First, Stantec contends that Appellant Flatiron-Zachry, a Joint Venture's ("FZJV") motion to vacate was untimely and, therefore, this appeal should be dismissed. The parties previously briefed Stantec's timeliness argument when Stantec moved to dismiss the appeal contending FZJV failed to timely file the notice of appeal, which this Court appropriately denied.¹ As FZJV detailed in its Return to Stantec's motion, it timely filed its motion to vacate in accordance with the Federal Arbitration Act's three-month limitations period, properly submitted a motion to reconsider to the circuit court in accordance with this Court's issue preservation rules after the circuit court denied that motion, and then timely appealed upon denial of that motion.

Second, Stantec contends that the Arbitration Panel properly granted summary judgment in its favor because there were no genuine issues of material fact on the dismissed claims. However, as FZJV detailed in its opening brief, the Arbitration Panel prematurely granted Stantec's motion while the parties were in the midst of discovery,² erroneously depriving FZJV of the opportunity to obtain necessary and appropriate discovery and foreclosing a hearing on the merits, both in contravention of the parties' Agreement to Arbitrate. This Court should reverse and vacate the arbitration award because: (1) the Arbitration Panel refused to hear evidence material to the controversy rendering the proceedings fundamentally unfair; (2) the Panel exceeded

¹ The Court's Order denied Stantec's motion "[a]fter careful consideration." The Order also stated that nothing would prevent Stantec from "raising the question of jurisdiction as an issue in the appellate brief if desired."

² The impropriety of the Panel's action was accentuated by the fact that the Panel issued conflicting orders as to whether there were genuine issues of material fact as to Stantec's scope of work.

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.

I. Appellant's motion to vacate was timely.

Stantec's primary argument is that despite Stantec failing to follow the applicable rules incorporated into the parties' Arbitration Agreement's and despite the Arbitration Panel's changing orders and incomplete orders, Flatiron's appeal is untimely procedurally. This is incorrect. First, as explained in more detail below, because all claims were not dismissed under the Panel's November 5, 2021 summary judgment order, there was not a "complete arbitration." As a result, any motion to vacate could not have been untimely. Second, as to the claims dismissed, out of an abundance of caution, Flatiron moved to vacate that dismissal while also noting to the Panel (through a motion to clarify or reconsider to the Panel) that it had contradicted itself and violated its own prior order and the applicable governing rules. In response, the Panel changed its rulings on the dismissed claims, after which Flatiron again moved to vacate. Under this fact pattern, Flatiron's motion to vacate (and this appeal) cannot be untimely.³

Stantec contends that a "final" arbitration award was issued on November 5, 2021 for purposes of the Federal Arbitration Act's ("FAA") three-month limitations period for moving to vacate, confirm, or modify the award. Stantec contends that because FZJV did not appeal following the circuit court's denial of its initial motion to vacate that order, FZJV's second motion to vacate was untimely, as is this associated appeal. However, there had not been a "complete arbitration" triggering the deadline for moving to vacate because one of FZJV's claims against Stantec remained pending, along with FZJV's claims against the other Defendants. Further, the

³ Moreover, as noted below, even if a motion to vacate deadline was triggered (which it was not), equitable tolling should apply under these circumstances. *See infra* Section I.C.

earliest point where the Arbitration Panel's order could even arguably be considered "final" for purposes of triggering the Federal Arbitration Act's ("FAA") three-month limitations period for moving to vacate was following the Panel's March 24, 2022 Order amending its November 5, 2021 Order. FZJV timely filed its second motion to vacate the award reflected in the March 24, 2022 and amended November 5, 2021 Orders, timely moved to reconsider the circuit court's denial of that motion, and timely appealed following the circuit court's denial of its motion to reconsider. Stantec's argument is without merit.

The full timeline of events and applicable rulings by the Arbitration Panel and circuit court are set forth in FZJV's opening brief. The following are the key events for purposes of the timeliness of FZJV's motion and this appeal:

- 11/5/2021 – The Arbitration Panel issues an order granting Stantec's motion for summary judgment on 5 of 6 grounds while denying summary judgment on the sixth. (*See* Arbitration Panel's Nov. 5, 2021, Order; R. 481.)
- 11/24/2021 – FZJV submits a motion to clarify or reconsider to the Arbitration Panel.
- 12/8/2021 – The Arbitration Panel issues an order denying FZJV's motion to clarify or reconsider. (*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 claim.
- 1/19/2022 – The Arbitration Panel again denies Stantec's motion on the sole remaining claim in an Order which made inconsistent findings with the November 5, 2021 Order. (*See* Arbitration Panel's Jan. 13, 2022, Order; R. 160.)
- 2/9/2022 – FZJV files a motion to vacate the November 5, 2021 Order pursuant to 9 U.S.C. § 12 of the FAA with the circuit court. (FZJV's Mot. to Vacate; R. 141.)
- 3/15/2022 – The circuit court issues an Order denying FZJV's motion to vacate. (Court's Mar. 15, 2022, Order; R. 11.)
- 3/18/2022 – FZJV submits a second motion to clarify or reconsider to the Arbitration Panel in light of the Panel's inconsistent rulings.

3/24/2022 – The Arbitration Panel issues an order ostensibly denying FZJV’s second motion to clarify or reconsider, but making substantive changes to its November 5, 2021 Order, including granting summary judgment to Stantec on an additional basis. (*See* Arbitration Panel’s Mar. 24, 2022, Order on Second Motion to Clarify or Reconsider; R. 158.)

6/22/2022 – FZJV timely files a motion to vacate the amended Order pursuant to 9 U.S.C. § 12 of the FAA with the circuit court. (FZJV’s Mot. to Vacate; R. 141.)

10/6/2022 – The circuit issues an order denying the motion to vacate the amended order. (Court’s Oct. 6, 2022 Order; R. 6.)

10/17/2022 – FZJV timely files a motion to reconsider the Court’s Oct. 6, 2022 Order with the circuit court pursuant to Rule 59(e). (FZJV’s Mot. to Reconsider; R. 129.)

6/21/2023 – The Court of Common Pleas denies FZJV’s motion to reconsider. (Court’s June 21, 2023 Order; R. 2.)

7/20/2023 – FZJV timely files its notice of appeal.

A. FZJV’s motion to vacate and this associated appeal were timely.

As the timeline above reflects, the relevant orders in the arbitration at the time of FZJV’s second motion to vacate were preliminary orders of the Arbitration Panel: (1) granting summary judgment on 5 of 6 claims brought by FZJV against Stantec while *denying* summary judgment on the sixth (the November 5, 2021 Order) and (2) purportedly denying FZJV’s motions to clarify or reconsider while *nevertheless substantively amending* the November 5, 2021 Order (the March 24, 2022 Order). FZJV’s final claim against Stantec remained outstanding and awaiting final disposition at the time it filed its motion to vacate on June 22, 2022.

The Federal Arbitration Act provides that any motion to vacate, modify, or correct an arbitration award “must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. Courts apply the “complete arbitration rule” to determine whether an arbitration award is final for purposes of judicial review such that the three-

month limitations period under the FAA is triggered. *McKinney Restoration Co. v. Ill. Dist. Council No. 1 of the Int'l Union of Bricklayers & Allied Craftworkers*, 392 F.3d 867, 872 (7th Cir. 2004).⁴ This embodies the principal that “where an arbitrator believes the assignment is completed, the award is final and appealable . . . [and when] the arbitrator does not believe the assignment is completed, the award is not final and appealable.” *Id.* An award is final when it is “intended by the arbitrator to be his complete determination of *every issue submitted to [the arbitrator].*” *Id.* at 871 (emphasis added). If any “substantive task remain[s] for the arbitrator to perform,” the award is not final. *Id.* When a court is asked to review an arbitrator’s decision, it should “refrain from doing so until the arbitrator has decided all facets of the dispute.” *Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union, Unincorporated Ass’n*, 815 F.3d 154, 160 (4th Cir. 2016).

Here, the Arbitration Panel’s denial of summary judgment on one of FZJV’s claims against Stantec in its November 5, 2021 Order supports that there was not a “complete arbitration” such that FZJV was **required** to proceed with a motion to vacate within three months or else this remedy would be barred. Nevertheless, FZJV proceeded with moving to vacate out of an abundance of caution that the circuit court might treat the Order as final as to the disposed-of claims.

Even if the Court assumes that the November 5, 2021 Order was an “award” that could trigger the statute of limitations, there was not a “complete arbitration” as to the disposed-of claims until, at the very earliest, when the Panel issued the March 24, 2022 Order clarifying the November 5, 2021 Order. Although the March 24, 2022 Order ostensibly stated that it was “denying” FZJV’s motion to clarify, it actually substantively modified the November 5, 2021 Order. Therefore, the

⁴ See also *Local 36, Sheet Metal Workers Int’l Ass’n v. Pevely Sheet Metal Co.*, 951 F.2d 947, 949–50 (8th Cir. 1992); *Union Switch & Signal Div. Am. Standard, Inc. v. United Elec., Radio & Mach. Workers, Local 610*, 900 F.2d 608, 610–12 (3d Cir. 1990).

earliest that the Arbitration Panel’s “award” on the disposed-of claims could have become final such that the FAA statute of limitations was triggered was March 24, 2022.⁵ FZJV timely filed its second motion to vacate (again, out of an abundance of caution that the circuit court would treat the award as final as to the disposed-of claims even though a “complete arbitration” had yet to occur) on June 22, 2022, within three months of this Order.

Stantec nevertheless contends that FZJV is “estopped” from raising any argument about whether the November 5, 2021 Order was a “final” order triggering the statute of limitations because in its first motion to vacate FZJV stated that the Award would be final as to the disposed-of claims if the stay of the circuit court proceedings was not lifted. (Br. of Resp. pp. 10-11.) As noted, although there has been no “complete” arbitration that would trigger the statute of limitations, FZJV proceeded with moving to vacate out of an abundance of caution that the November 5, 2021 Order could be deemed a “final” award by the circuit court as to the five disposed-of claims. The Panel then made substantive amendments to that Order and FZJV again moved to vacate out of an abundance of caution. FZJV has not taken two “totally inconsistent” positions as part of “an intentional effort to mislead the court,” and thus judicial estoppel does not apply. *See Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004) (setting forth the elements of judicial estoppel).

Importantly, Stantec did not move to vacate any of the Arbitration Panel’s actions or Orders. Stantec did not take issue with the Panel’s amendment of the November 5, 2021 Order

⁵ The case that Stantec cites examining the finality of a partial award, *Crawford*, addressed a different scenario than the one at issue here. *Crawford* and the cases discussed therein were all examining whether it was appropriate for a reviewing court to proceed with hearing a motion to vacate filed when only a portion of the issues in the matter had been resolved. These cases *were not* looking at whether a partial award triggered the three-month limitations period such that it would *bar* a motion to vacate that partial award. *See generally Crawford Grp., Inc. v. Holekamp*, No. 406-CV-1274 CAS, 2007 WL 844819, at *4 (E.D. Mo. Mar. 19, 2007).

through FZJV's second motion to clarify or contend that this was improper. Therefore, Stantec has waived any argument that the November 5, 2021 Order was the "final" award for purposes of the limitations period as it now contends in its brief.

For all these reasons, the November 5, 2021 Order was not a final award triggering the three month period for moving to vacate. FZJV timely filed its motion to vacate on June 22, 2022, within three months of the Panel's March 24, 2022 Order.

B. *Elam* is inapposite to this situation.

Stantec also contends that FZJV's motion to vacate and this appeal were untimely because FZJV made successive "motions to reconsider" asserting the same grounds, relying on *Elam v. South Carolina Dept. of Trans.*, 361 S.C. 9, 602 S.E.2d 772 (1994). *Elam*, however, is not analogous because FZJV has only submitted one motion to reconsider – a motion which it was required to file to preserve its appellate grounds under South Carolina's issue preservation rules.

The issue preservation rules require that any question presented "must first have been fairly and properly raised in the lower court and passed upon by that Court." *Sloan v. S.C. Dep't of Rev.*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014) (quoting *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011)). Here, the lower court's order denying FZJV's motion to vacate was a one paragraph order merely stating that the motion was denied without specifically ruling on each of the arguments raised in FZJV's motion. Therefore, the issue preservation rules **required** FZJV to submit a motion to reconsider to the circuit court to preserve its appellate grounds. *See Shealy v. Aiken County*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding that the trial judge's general ruling was insufficient to preserve a specific issue for appellate review, explaining that where the trial judge does not explicitly rule on argument raised, and no Rule 59 motion was filed, the appellate court may not address the issue); *Great Games, Inc. v. South Carolina Dep't of*

Revenue, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (circuit court failed to rule on constitutional issue and appellant did not raise the omission in its Rule 59, SCRCP, motion; therefore, the issue was not preserved for appellate review).

As *Elam* explained, a timely motion to reconsider typically tolls the deadline for appealing under normal circumstances. This is because South Carolina’s “mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.” *Id.* at 25, 602 S.E.2d at 780. Thus, as the *Elam* court reasoned, a party is usually allowed “to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* at 21, 602 S.E.2d at 778-79. There are only two narrow exceptions to the rule: (1) “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”; and (2) “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.” *Id.* at 20, 602 S.E.2d at 778 (emphasis added).

This case does not fall into either of *Elam’s* exceptions to the general rule. Here, there was not a final decision that FZJV moved the *court* to reconsider on the merits pursuant to Rule 59(e), a denial by the *court*, and a successive Rule 59(e) restating the same arguments previously made to the court. Stantec’s argument incorrectly conflates the motions to clarify or reconsider that FZJV made to the *Arbitration Panel* with motions to reconsider under Rule 59(e) (asserting that the FZJV’s Rule 59(e) motion filed with the circuit court was a “third attempt”). As detailed above, the relevant sequence here was an order of the Arbitration Panel, denial of FZJV’s initial motion to vacate that order by the circuit court, a substantive amendment of the arbitration order

by the Arbitration Panel (prior to the expiration of the time to move to reconsider or appeal the denial of the motion to vacate), denial of FZJV's motion to vacate the as-amended order by the circuit court, one timely motion to reconsider that court order, and then a timely appeal following denial of that motion. Stantec's argument is without merit.

C. Equitable tolling should also apply to the extent the Court has any concerns about timeliness.

As noted, FZJV's motion and this related appeal were timely. However, even if the Court has any questions regarding timeliness, equitable tolling should apply.

Two federal circuit courts of appeal have recognized in recent years that equitable tolling applies to the FAA. *See Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1157–58 (9th Cir. 2016); *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 874 (11th Cir. 2023). As the Ninth Circuit explained in *Move, Inc.*, while the FAA reflects a “national policy favoring arbitration with just the limited review’ of the courts necessary to maintain finality in arbitral proceedings, ‘[t]he general pro-arbitration policy relies on the assumption that the forum is fair, and therefore cannot justify special deference to arbitration outcomes in the face of a colorable claim that the forum was unfair in a particular case.’” 840 F.3d at 1157–58 (quoting *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 F. App'x 243, 246 (6th Cir. 2004)). As the court explained, § 10 of the FAA's limited grounds for review were “designed to preserve due process,” and thus: (1) “[b]alancing the needs for both finality and due process, the arbitral process will not be disrupted if parties are permitted to satisfy the high bar of equitable tolling in limited circumstances” and (2) “[m]ore importantly, permitting equitable tolling will enhance both the accuracy and fairness of arbitral outcomes.” *Id.* (quoting *Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

The Eleventh Circuit in *NuVasive* expressly relied on *Move, Inc.*, and reached the same holding. *See* 71 F.4th at 874 (finding that the three-month deadline was merely a statute of limitations eligible for tolling and not a jurisdictional precondition, noting that “equitable tolling does not contravene the FAA’s text, structure, or purpose” and concluding that the District Court appropriately found it was warranted under the facts of the case).

Under South Carolina law, courts have broad power to apply equitable tolling. As the Supreme Court has explained, “[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.” *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116–17, 687 S.E.2d 29, 33 (2009) (quoting *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex. Ct. App. 2006)). Therefore, “[e]quitable tolling may be applied where it is justified under all the circumstances,” although “used sparingly and only when the interests of justice compel its use.” *Id.* “[E]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.” *Id.* at 116, 687 S.E.2d at 32. Moreover, it may be applied “[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits.” *Id.* at 115, 687 S.E.2d at 32 (quoting 54 C. J. S. *Limitations of Actions* § 115 (2005)).

Therefore, based on the foregoing, even if the Court believes that the Arbitration Panel reached a final award (which it did not) and that Appellant’s motion to vacate the modified award was not timely (which it was), the confusion generated by the Arbitration Panel’s handling of this matter and the conflicting nature of the series of orders warrants applying equitable tolling in this circumstance to the extent there is any question as to the timeliness of FZJV’s motion to vacate

and this appeal. As noted above, the Panel's orders changed with time, including substantive modifications to its prior orders on March 24, 2022, and the Panel made conflicting findings as to whether there were genuine issues of material fact as to Stantec's scope of work. As discussed more fully below, the Arbitration Panel also improperly prohibited FZJV from developing the record through discovery and refused to hear evidence material to the controversy. This violated the parties' Agreement to Arbitrate and the Panel's own order denying Stantec's initial summary judgment motion as premature with leave to refile at the *close* of discovery. Moreover, the Panel exceeded its authority by entertaining and ruling on Stantec's prematurely filed motion that was not submitted in accordance with the requirements of AAA Construction Arbitration Rule 34.

In light of the significant due process concerns raised by the Panel's actions here, the equities tip in FZJV's favor and warrant application of equitable tolling if the Court has any question regarding timeliness.

II. Stantec's arguments on the merits are unavailing.

Stantec's brief hinges much of its argument on the merits around scenarios that are not analogous to the circumstances giving rise to FZJV's motion to vacate. FZJV was not contending that the Arbitration Panel erred on the merits in misapplying the law to the facts, rendered an ambiguous decision, or failed to give sufficient explanation for its award. Rather, FZJV's motion to vacate was premised on the Arbitration Panel's refusal to comply with the parties' agreed-upon arbitration procedure and issuance of a premature summary judgment order while discovery was ongoing in the face of its own directive that such a motion could be filed at the *close* of discovery. The Panel's short-circuiting of the arbitration proceedings violated its duties under the parties' agreement and deprived FZJV of its opportunity to be fully heard. Courts retain the power to review and vacate arbitration awards to rectify this exact type of manifest unfairness.

A. FZJV specifically identified the additional discovery that it was prohibited from conducting and its materiality.

Stantec's primary argument on the merits is that FZJV failed to identify the specific evidence that would have supported a genuine issue of material fact on the five claims where the Panel granted summary judgment. The problem with Stantec's position, however, is that the *Panel improperly terminated discovery* and deprived FZJV of the opportunity to fully develop the record and identify all such evidence. Nevertheless, as detailed in its opening brief, FZJV *did* identify the additional discovery that it intended to conduct, all of which would have been material to its claims against Stantec: (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.⁶

This discovery would have led to material evidence supporting: (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.

⁶ Stantec faults FZJV for identifying its own expert and corporate representative's deposition testimony as a potential source of evidence, noting that they could have simply submitted affidavits if they had any opinions to support FZJV's claims against Stantec. However, this ignores the holistic nature of discovery. These witnesses only had certain pieces of the puzzle available to them because the Panel prohibited FZJV from having the opportunity to depose other key witnesses such as the Stantec corporate designee and engineer. Regardless, as noted, this was not the only testimony which FZJV contended would have supported genuine issues of material fact.

All of this evidence and testimony would have demonstrated that genuine issues of material fact existed making summary judgment inappropriate.⁷ The Arbitration Panel, however, deprived FZJV of the opportunity to conduct this appropriate and necessary discovery and thereby prohibited FZJV from presenting any of this pertinent and material evidence. The Arbitration Panel's refusal to permit FZJV to depose Stantec's corporate designee and engineer is particularly erroneous and not in conformity with the parties' arbitration agreement.

B. FZJV was not seeking an improper delay, it was seeking to obtain the discovery that it was entitled to obtain under the Agreement to Arbitrate and present material evidence in support of its claims.

Stantec analogizes this matter to cases denying motions to vacate where the moving party had requested to delay the merits hearing in order to conduct further discovery and the arbitrator denied this request.⁸ This also misconstrues FZJV's argument. FZJV's position has never been

⁷ Stantec cites FZJV's written discovery responses to support their contention that FZJV could not identify any errors or omissions committed by Stantec. (Stantec Resp. to Mot. to Vacate, Ex. 1-FZJV's Responses to Stantec's Interrogatories; R. 289.) However, while Stantec is correct that these responses stated that, at the time of service, FZJV was "without sufficient information to form an opinion as to whether Stantec, specifically, contributed to . . . errors and omissions" in the design, they were served on November 19, 2020 – *nearly a year prior to the Panel's Nov. 5, 2021 Order*. Considerable discovery was conducted after the service of these responses and, as noted above, significant discovery remained to be completed at the time of the Panel's Order.

Stantec also asserts that the affidavit of expert Kevin O'Connell that FZJV submitted with its Complaint failed to identify any specific errors or omission committed by Stantec. (Affidavit of Kevin O'Connell; R. 15.) However, this suffers from the same fundamentally flawed premise. O'Connell's affidavit was prepared and submitted in 2019, and thus was not an accurate snapshot of the record at the time the Panel issued its Nov. 5, 2021 Order. In any event, this was a preliminary affidavit to satisfy the requirements of S.C. Code Ann. 15-36-100(B), which only requires that any action alleging professional negligence attach an expert affidavit "specify[ing] at least one negligent act or omission claimed to exist and the factual basis for each claim *based on the available evidence at the time of the filing of the affidavit.*" *Id.* (emphasis added).

⁸ Stantec analogizes FZJV's position to a motion pursuant to Rule 56(f), SCRPC. Stantec correctly notes that South Carolina law requires a party opposing summary judgment in state court who contends that further discovery is warranted to identify the additional relevant evidence that it believes discovery will uncover. *See Guinan v. Tenet Health Systems of Hilton Head, Inc.*, 383

that the Panel should have *delayed the hearing* so that the parties could conduct additional discovery. Rather, FZJV has consistently argued that the Panel should have followed the agreed-upon arbitration procedures and the directive of its own order that Stantec could submit its motion for summary judgment at the close of discovery.

The Agreement to Arbitrate provided that the parties agreed that the matter would be handled under the AAA Construction Arbitration Rules. (Agreement to Arbitrate p.2; R. 172.) The Construction Arbitration Rules are primarily geared towards efficiently advancing the proceedings towards an evidentiary hearing on the merits. The Rules support that a dispositive motion should be the exception rather than the rule, providing that upon *prior written application*, the arbitrator *may* permit a dispositive motion that would dispose of “all or part of a claim, or narrow the issues in a case.” See AAA Construction Rule 34; see also J.S. “Chris” Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 Am. J. Trial Advoc. 265, 267 (2008) (“[T]he American Arbitration Association (AAA) rules do not expressly authorize motions to dismiss or for summary judgment, regardless of how meritorious such a motion might be.”). Here, it is undisputed that *Stantec neither requested nor received such prior written application*.

As FZJV detailed in its opening brief, the operative scheduling order contemplated full and complete discovery.⁹ (See Amended Scheduling Order; R. 295.) Among other things, the Amended Scheduling Order guaranteed each party up to ten fact witness depositions and provided

S.C. 48, 54-55, 677 S.E.2d 32, 35-36 (Ct. App. 2009). Here, however, FZJV did precisely that, as detailed above.

⁹ As the District of South Carolina has noted on numerous occasions, “[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Jordan v. E.I. du Pont de Nemours & Co.*, 867 F. Supp. 1238, 1250 (D.S.C. 1994). The same principles are just as apt in examining the import of the Amended Scheduling Order in place in the arbitration proceedings here.

any expert providing a report “shall” be subject to deposition. (*Id.* at p. 2-3.) It also provided that the parties would have until January 31, 2022 to complete discovery, including any depositions. January 31 was also the deadline for submitting dispositive motions.¹⁰ Thus, the Panel’s Nov. 5, 2021 Order was issued almost *three months* prior to the expiration of the discovery deadline.

The Panel’s denial of Stantec’s first motion for summary judgment is important as well. (Arbitration Panel’s Feb. 9, 2021 Order.) In that Order, the Panel noted that Stantec’s motion was “premature” in view of the “current status of on-going discovery” and held that Stantec’s motion was dismissed “without prejudice and with leave to be brought again **at the close of discovery** and in conformance with the other provisions of the current Scheduling Order in this case.” (*Id.* (emphasis added).) The Panel then subsequently disregarded their own holding, which FZJV was entitled to rely upon, when it later granted Stantec’s motion three months prior to the close of discovery. Although Stantec contends that the Order’s language could be construed as an invitation to submit another summary judgment motion prior to the close of discovery, this is not a fair reading of the plain language of the Order. If the Panel had intended to make such a ruling, it would have simply denied the motion “with leave to submit at a later date.”

Stantec’s contention that “[l]ong-established rules permit summary judgment motions prior to the close of discovery” is also not applicable here. Stantec relies on Rule 56 of the South Carolina Rules of Civil Procedure and authorities interpreting its federal counterpart to support this point, but AAA Construction Rule 34 is the applicable standard here and contemplates early dispositive motions only upon written application and granted prior leave by the arbitrator.

¹⁰ The Amended Scheduling Order stated that a final evidentiary hearing would begin on March 28, 2022, and contemplated fifteen days of hearings. (*Id.* at p. 1; R. 295.)

Again, summary judgment is intended to be the rare exception in arbitration, not the rule. *See, e.g.,* Albert Bates Jr., R. Zachary Torres-Fowler, *The Intersection of International Arbitration and Construction Disputes: A Review of the 2019 Queen Mary University of London International Arbitration Survey*, *Constr. Law.* at 20, 28 n.84 (Spring 2020) (“It is often said that arbitrators in domestic U.S. construction arbitration matters are reluctant to grant summary disposition, except in exceedingly rare circumstances, out of concerns for due process and the protection of the award.”); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 *U.S.F. L. Rev.* 105, 113 (2003) (explaining that “[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant,” and noting that in the employment arbitration context, virtually all matters “receive a hearing on the merits”). The Panel’s flagrant disregard for the parties’ Arbitration Agreement and its own Order requires vacatur in this matter.

C. The cases cited by Stantec are distinguishable.

Stantec cites several categories of inapposite cases that do not override the need for vacatur under these facts. First, they cite to several cases discussing the need to identify the materiality of excluded evidence where a party seeking vacatur contends the arbitrator refused to hear evidence. However, each of the cases cited by Stantec involved a *hearing on the merits* and the arbitrator’s refusal to hear discrete pieces of evidence at said hearing. None involved a situation where the arbitrator prematurely shut down discovery and deprived the parties of the opportunity to develop the evidence in the first place. *See, e.g., Hale v. Morgan Stanley*, 571 F. Supp. 3d 872, 879-80 (S.D. Ohio 2021) (stating that the parties presented four days of testimony at the evidentiary hearing); *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 109, 333 S.E.2d 781, 788 (1985) (noting that the arbitration merits hearing consisted of *forty-one* days of proceedings); *e.spire Communications, Inc. v. CNS Communications, Inc.*, 39 F. App’x 905, 909-10 (4th Cir.

2002) (affirming denial of a motion to vacate where the moving party failed to disclose any proposed witnesses or exhibits prior to the merits hearing and thus was prohibited by the Panel from introducing any exhibits or calling witnesses at the merits hearing). The concerns expressed by the courts in these cases were not at issue here.

Stantec then cites to several cases which they contend support that “[l]imitations on discovery do not require vacatur.”¹¹ (Resp. Br. p. 16.) However, again, none of the cited cases involved anything analogous to what the Panel did here. First, *Freeman v. Citibank, N.A.*, No. 314CV00067TCBRGV, 2015 WL 13777266, at *1 (N.D. Ga. Jan. 20, 2015) involved a pro se plaintiff where the JAMS arbitration panel nevertheless permitted “discovery and an in-person arbitration hearing.” *Id.* at *2. In rejecting the motion to vacate which alleged that the panel improperly refused additional discovery, the court highlighted that the claimant had been “afforded the opportunity to engage in *extensive discovery* throughout the arbitration proceedings—an opportunity of which she also took *full advantage*.” *Id.* at *17 (emphasis added).

The next case Stantec cites is *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 19 (D. Mass. 2002). In that case, the court denied a motion to vacate where the moving party had “received a *full and adequate hearing*,” and the record reflected that the parties “had over two years to conduct discovery and prepare for the [] hearing.” *Id.* at 19 (emphasis added). Moreover, the arbitrators accepted briefs and heard *three days* of evidence. *Id.*

The third case Stantec relies on is *Schmidt v. Finberg*, 942 F.2d 1571, 1572–73 (11th Cir. 1991). In this case, the Eleventh Circuit upheld the lower court’s refusal to vacate an arbitration award where the panel rejected a request to continue the merits hearing due to the unavailability

¹¹ None of the cases Stantec cites are precedent. Stantec cites to an Eleventh Circuit case, and two cases from the District of Massachusetts, and an unreported case from the Northern District of Georgia—all federal cases from outside the Fourth Circuit.

of the movant's corporate witness. The panel held *three days* of evidentiary hearings. In determining that the panel's refusal to continue the hearing or hold it open to receive the witness's testimony was appropriate, the court noted two critical facts. First, the movant's counsel failed to clearly communicate their availability (stating that they were available the "first week of May," which the panel appeared to have understood to mean the first full week of May, which is when the hearing occurred). Second, the only justification given by the movant was that the witness had a seminar schedule during two of the three hearing dates and "[c]ancelling the engagement would cause immediate and irreparable damage to [the witness's] credibility and reputation in the commodities industry." *Id.* The movant did not provide *any* details whatsoever about what the witness would testify regarding or proffer his testimony. *Id.* at 1574. Rather, the justification was merely that he wanted to be present and "his voice to be heard." *Id.* This case thus does not support Stantec's position here.

The last case Stantec cites, *ALS*, also involved a request to delay the merits hearing. However, the basis of the continuance request was the movant's continued pursuit of third-party subpoena documents. The third parties had responded to the subpoenas, but the moving party was unsatisfied with the responses and filed court proceedings seeking to compel further information. *ALS & Assocs., Inc. v. AGM Marine Constructors, Inc.*, 557 F. Supp. 2d 180, 182 (D. Mass. 2008). Here, yet again, the arbitrator *did* conduct a merits hearing. *See id.* at 182 (noting that the matter proceeded to an arbitration hearing culminating in an award).

Therefore, the case law relied on by Stantec stands in stark contrast to the present case where FZJV did not have the chance to even complete discovery (including the taking of key depositions) much less receive an evidentiary hearing on the merits. The cases discussed in FZJV's

opening brief are more analogous to the unusual circumstances here and demonstrate why vacatur is necessary here.

III. The Court should reverse the lower court and vacate the arbitration award.

As FZJV detailed in its opening brief, vacatur is warranted on three independent bases. First, by short-circuiting the discovery process, the Arbitration Panel improperly prohibited FZJV from developing the record and refused to hear evidence material to the controversy. This rendered the proceedings fundamentally unfair and deprived FZJV of a fair hearing. The Arbitration Panel was derelict in its duties under 9 U.S.C. § 10(a)(3), which required the Panel to hear all evidence “pertinent and material” to the controversy. *Id.*

Second, reversal and vacatur is warranted under 9 U.S.C. § 10(a)(4) because the Panel exceeded its power and the scope of its authority, violated the parties’ Agreement to Arbitrate, and acted arbitrarily. As detailed above and in FZJV’s opening brief, the Agreement to Arbitrate and operative Amended Scheduling Order contemplated a full and complete discovery process, as did the Panel’s order denying Stantec’s initial summary judgment motion as premature with leave to refile at the *close* of discovery. The Panel exceeded its authority by entertaining and ruling on Stantec’s prematurely filed motion that was not submitted in accordance with the requirements of AAA Construction Arbitration Rule 34.

Finally, this Court should reverse the lower court and vacate the arbitration award because the Panel manifestly disregarded and misconstrued applicable law by issuing a series of conflicting summary judgment orders.¹² The Panel’s November 5, 2021 and January 19, 2022 Orders were

¹² Stantec cites a case from the Southern District of New York, contending that the case sets for the applicable standard for this argument. *See Landmark Ventures, Inc. v. InSightec, Ltd.*, 63 F. Supp. 3d 343, 355 (S.D.N.Y. 2014). As the case law cited in FZJV’s opening brief detailed, however, manifest disregard of the law is a standard recognized by South Carolina common law and governed by the standard articulated by South Carolina precedent. As this Court has

inconsistent. The November 5 Order 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. 481.) As to the MSE Wall claims, the Panel stated that it was “undisputed” that “Stantec did not provide any pre award services” for this work, and CECS’s contract with Stantec did not anticipate that it would provide input for this design. (*Id.*) However, the Panel’s January 19, 2022 Order recognized that there was a disputed issue of material fact regarding the work Stantec actually performed (as opposed to what work Stantec contracted with CECS to perform), and thus denied Stantec’s motion on that basis. (Arbitration Panel’s Jan. 13, 2022, Order; R. 160.) As a result, the Panel’s stated basis for denying summary judgment in the January 19 Order fundamentally undermined and conflicted with its prior ruling since it found that material facts *did* exist regarding the engineering services Stantec performed for CECS and the scope of those services.

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 by (1) adding that the Panel did intend to grant summary judgment in Stantec’s favor on the “Wall 32 issues . . . to include the shoring issues along with the strap length issues” and (2) modifying the Order to remove the MSE Walls from the list of items it had previously stated where it was “undisputed” that Stantec did not provide pre-award services. (*See* Arbitration Panel’s March 24, 2022, Order; R. 158.) In removing

explained: “manifest 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)).

the MSE Walls from the list of “undisputed” facts, the Arbitration Panel demonstrated that disputed issues of fact did exist on the MSE Wall issue, making summary judgment inappropriate.

The Panel demonstrated a manifest disregard of governing summary judgment law and procedure in issuing these conflicting orders. Vacatur is warranted because the Panel’s summary judgment orders were all premature, Stantec’s motions were each submitted without proper application and permission to file as required by Rule 34, the Panel inconsistently applied the summary judgment standard, and by issuing these premature Orders the Panel improperly short-circuited the discovery process and refused to hear evidence material to the controversy in contravention of the agreement between the parties and controlling law.

CONCLUSION

For the reasons stated above and in FZJV’s opening brief, this Court should reverse the lower court and enter an Order vacating the Panel’s November 5, 2021, and March 24, 2022, Orders/Awards.

Signature on Following Page

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