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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Shafer Goodstein, Circuit Court Judge

Court of Common Pleas Case No. 2022-CP-18-01997
Appellate Court Case No. 2024-000698

AJP Solutions, LLC,Respondent,

v.

Clark Construction, Inc. of Mississippi, TCABC Real Estate Holdings,
LLC, and Travelers Casualty and Surety Company of America, Defendants,

of which

Clark Construction, Inc. of Mississippi is the.....Appellant.

INITIAL BRIEF OF APPELLANT

/s/ Bryan P. Kelley

Bryan P. Kelley, Esq. (S.C. Bar 76062)
H. Drennan Quattlebaum, Esq. (S.C. Bar 106418)
Elmore Goldsmith Kelley & deHoll, P.A.
19 Blair Street (29607)
Post Office Box 1887
Greenville, South Carolina 29602
Telephone: (864) 255-9500
Facsimile: (864) 255-9505
bkelley@elmoregoldsmith.com
dquattlebaum@elmoregoldsmith.com

Counsel for Appellant

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN DENYING CLARK'S TIMELY MOTION TO CONFIRM THE ARBITRATION AWARD AND ORDERING THE PARTIES BACK TO ARBITRATION WHERE AJP FAILED TO TIMELY RAISE A MOTION TO VACATE, MODIFY OR CORRECT THE ARBITRATION AWARD?

- II. DID THE TRIAL COURT ERR AS A MATTER OF LAW BY MISAPPLYING THE PROPER STANDARD OF REVIEW OF AN ARBITRATION AWARD WHEN THE TRIAL COURT IMPLIED THAT THE ARBITRATOR MANIFESTLY DISREGARDED THE LAW GOVERNING THE VALIDITY OF A SETTLEMENT AGREEMENT BETWEEN CLARK AND A NON-PARTY TO THE ARBITRATION?

- III. DID THE TRIAL COURT ERR AS A MATTER OF LAW BY MAKING LEGAL AND FACTUAL FINDINGS OF AGENCY IN APPLYING THE WITNESS REQUIREMENTS OF S.C. CODE ANN. § 62-8-105 TO AN INDEMNITY AGREEMENT BETWEEN ARCH AND AJP?

STATEMENT OF THE CASE

This is an appeal from an Order of the Dorchester County Court of Common Pleas (the “Trial Court”) (1) denying Clark Construction, Inc. of Mississippi’s (“Appellant” or “Clark”) Motion to Confirm Arbitration Award; and (2) ordering this matter back to arbitration. The procedural history of the appeal involves an intertwined arbitration before the American Arbitration Association (the “AAA”) and the underlying lawsuit before the Trial Court. Both matters arise out of a December 16, 2020, subcontract agreement (the “Subcontract”) between AJP Solutions, LLC (“Respondent” or “AJP”) and Clark wherein AJP was to provide certain materials and labor in connection with the construction of an assisted living facility project in Dorchester County, South Carolina (the “Project”). Compl. ¶ 6. During the course of the Project, disputes arose between Clark and AJP, which led to Clark’s termination of AJP. Clark’s Motion to Confirm Hearing Transcript, 5:3-6. AJP disputed the validity of Clark’s termination and contended it was owed an unpaid contract balance for the labor and materials it provided to the Project. Compl. ¶ 7.

These disputes culminated in AJP’s September 28, 2022 filing of a mechanic’s lien against the Project (the “Mechanic's Lien”) and a subsequent lien foreclosure action against Clark and other interested parties. On Clark’s Motion, the Trial Court stayed the instant action and referred the disputes between Clark and AJP to arbitration before the AAA.

The matter accordingly proceeded to arbitration before the AAA, but soon thereafter the AAA Arbitrator dismissed the arbitration based on a settlement agreement entered between Clark and Arch Insurance Company (“Arch”), which the Arbitrator deemed to resolve all claims referred to arbitration. The context and content of this settlement agreement and the Arbitrator’s order of dismissal are discussed in detail below. On August 14, 2023, Clark filed a Motion to Confirm the Arbitration Order of dismissal (“Clark’s MTC”) with the Trial Court. *See* Clark’s MTC. The

Honorable Diane Schafer Goodstein heard oral arguments on Clark's MTC in a virtual proceeding on November 27, 2023. *See generally* MTC Hearing Transcript.

On January 10, 2024, the Trial Court entered an Order denying Clark's MTC and ordering the parties back to arbitration. Order denying Clark's Motion to Confirm the Arbitration Award, issued January 10, 2024, 6. More specifically, the Trial Court's January 10th Order states, **"In reviewing an arbitration award for the purpose of confirmation or vacating of the same, this Court must determine whether the arbitrator's award demonstrates a manifest disregard for the law.... The Court agrees that Arch overstepped its authority by attempting to negotiate AJP's claims against Clark..."** *Id.* at 3-4.

On January 19, 2023, Clark filed a Motion to Alter or Amend ("Motion to Reconsider") the Trial Court's Order. *See* Clark's Motion to Reconsider, filed January 19, 2023. On April 1, 2024, the Trial Court issued an Order Denying Clark's Motion to Reconsider and finding that **"[i]n [[Clark's] [M]otion [to] [Reconsider], Defendant Clark has failed to raise any new arguments which have not previously been before this Court. This Court finds that the issues raised at the hearing were correctly decided and are properly reflected in the Order."** Order Denying Defendant's Motion to Reconsider, 2.

Clark served its Notice of Appeal on counsel for AJP on April 26, 2024, and filed same with this Court on April 26, 2024. *See* Notice of Appeal. Clark appeals, *inter alia*, the Trial Court's ruling denying the confirmation of the arbitration award and the Trial Court's ruling on an issue that was not properly before the Trial Court. Moreover, Clark appeals the Trial Court's use of an improper standard of judicial review of an arbitration award through the Trial Court's usurpation of the powers of the Arbitrator in which the Trial Court improperly determined questions of law

and fact. Lastly, Clark appeals the Trial Court's ruling determining that the Power of Attorney provision in Arch and AJP's Indemnity Agreement was unenforceable under South Carolina law.

STATEMENT OF THE FACTS

-The Project and Subcontract-

This case involves the construction of an assisted living facility Project known as the Claiborne at Brickyard Crossing and located in Dorchester County, South Carolina. Clark's Motion to Dismiss ¶ 1. On or about November 9, 2020, Clark entered into a contract to serve as general contractor on the Project with the owner, TCABC Real Estate Holdings, LLC ("TCABC"). *Id.* Subsequently, on or about December 16, 2020, Clark entered into the Subcontract with AJP, wherein AJP was to provide certain drywall and painting work to Clark for the Project. *Id.* ¶ 2. The Subcontract contains an arbitration agreement, which provides, in relevant part, that the Federal Arbitration Act ("FAA") is to govern any dispute amongst AJP and Clark:

Contractor and Subcontractor acknowledge and agree that this Subcontract affects Interstate Commerce and the Federal Arbitration [Act], 9 U.S.C.A. Section 1 et seq. applies. The foregoing agreement to arbitrate shall be specifically enforceable under the Federal Arbitration Act and any other applicable law in any court having jurisdiction thereof.

All claims, disputes, and other matter in controversy between the Contractor, Subcontractor, and all individual signatories hereto, arising out of or relating to this Subcontract shall be decided by mandatory and binding arbitration in accordance with the current and applicable Construction Industry Rules and procedures of the American Arbitration Association, except as specifically provided below . . .

Id. ¶ 4; Ex. A.

Additionally, in furtherance of its contractual obligations under the Subcontract with Clark, AJP furnished payment and performance bonds (the "Payment Bond" and the "Performance Bond") naming Arch as surety, AJP as principal, and Clark as obligee. Clark's MTC ¶ 2.

-Arch Insurance Company Indemnity Agreement under AJP's Performance and Payment Bond-

The Performance Bond is particularly relevant to this matter, as it secured AJP's performance obligations to Clark under the Subcontract. *Id.* To induce Arch to issue the Payment

and Performance Bonds, AJP and other individual indemnitors executed a document entitled “ARCH INSURANCE COMPANY INDEMNITY AGREEMENT” (the “Indemnity Agreement”), naming AJP and other non-parties as Indemnitors and Arch as Indemnitee. Clark’s MTC, Ex. B at 17. The relevant language of the Indemnity Agreement provides:

5. Assignment: (I) Scope: Indemnitor assigns and pledges to Surety as security, a lien and security interest in its interest, title, and rights in and growing out of the following: (a) any bonded contract, any agreement related to a bonded contract including any labor or supply subcontract and any bond in support thereof, and any action, claim or demand which indemnitor may acquire against any party to these contracts or otherwise related to a bonded contract; (b) all machinery, supplies, equipment, plant, tools and materials which are or may be on the site of the bonded contract, including materials purchased, being constructed, in storage, or in transit; (c) to the extent Surety determines necessary to fulfill or complete bonded obligations: licenses, patents, copyrights, trade secrets, limited partnership and general partnership interests; (d) any funds that are due or may become due on a bonded contract or other contract, including retention and recovery from claims. (II) Exercise of Rights by Surety: The assignment is effective upon the date of this Indemnity Agreement, but the Surety may exercise its rights only if indemnitor: (i) breaches a bonded contract, Bond, or the Agreement; (ii) is declared in default by a Bond obligee or a payment bond claim is made; (iii) makes an assignment for the benefit of creditors; an application for the appointment of a trustee or receiver is made; or files an application under the Bankruptcy Code or similar laws of any state; (iv) is subject to any proceeding which deprives it of the use of the materials referred to in (b), above; (v) is debarred or otherwise declared ineligible for public work; and (vi) if an individual, an indemnitor’s death, disappearance, incompetence, insolvency, conviction of a felony or imprisonment.

6. Security Agreement: This Agreement shall constitute a Security Agreement to the Surety and a Financing Statement, both in accordance with the Uniform Commercial Code of every jurisdiction in which such Code is in effect, but the filing or recording of the Agreement shall be solely at Surety's option, and the failure to file shall not release or impair any indemnitor’s obligations under the Agreement or otherwise, nor shall it be in any manner in derogation of any of the Surety's rights.

7. Power of Attorney: ***Indemnitor irrevocably appoints Surety as Attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of Indemnitor assigned to Surety above, and to execute on behalf of and sign Indemnitor’s name to any document deemed necessary by Surety to give full effect to the purposes of the Agreement.*** Indemnitor hereby ratifies all acts taken by Surety as attorney-in fact, ***acknowledges that this power of attorney is a power***

coupled with an interest, and agrees to hold harmless Surety from any claims, damages, loss or expense incurred by its use.

8. Surety's Rights: (a) Loss: Surety has the right at its sole discretion to pay or settle any Loss and the sworn voucher of payment signed by Surety shall be prima facie evidence of Indemnitor's liability; (b) Suits: Surety may bring separate lawsuits to recover under the Agreement, and doing so or recovering by way of judgment upon a cause of action shall not prejudice or bar the bringing of suits upon other causes of action, whenever they may arise; (c) Other Agreements: Any rights Surety may have or acquire against Indemnitor under the Agreement are in addition to and not in lieu of any rights afforded Surety under any other agreement related to surety credit; and, if Surety executes any Bond with a co-surety or reinsures all or part of a Bond, all the terms of the Agreement shall apply and operate for the benefit of the co-surety and reinsurer, as their interests may appear; (d) Decline or Cancel Bonds: Surety shall have the right to decline or cancel a Bond at any time, free of claim for loss or damage by Indemnitor, and Surety shall be under no obligation to disclose its reasons therefore, the provisions of any law to the contrary being hereby waived; (e) Non-waiver- the exercise, delay or failure by Surety to exercise any right, remedy or power whatsoever shall not preclude any subsequent exercise or waiver of these or any other rights, remedies by the Surety.

Id. (emphasis added).

-The Mechanic's Lien and Complaint-

Various disputes arose between Clark and AJP during the Project, which culminated in Clark's termination of AJP whilst AJP contended it was owed an unpaid contract balance from Clark for its work on the Project. *See* MTC Hearing Transcript, 5:3-12. On September 28, 2022, AJP filed a mechanic's lien with the Dorchester County Register of Deeds Office in which AJP contended it was owed \$626,429.28. Compl. ¶¶ 8-9. Subsequently, Clark filed a Mechanic's Lien Discharge Bond naming Travelers Casualty and Surety Company ("Travelers") as surety, Clark as principal, and AJP as obligee to substitute as security for AJP's Mechanic's Lien on October 6, 2022. Compl. ¶ 10.

AJP initiated this action on December 28, 2022, against Clark, TCABC, and Travelers, asserting, *inter alia*, a claim against the Mechanic's Lien Discharge Bond¹ for the alleged unpaid Subcontract balance. *See* Compl.

-The Case is Stayed and the Parties Compelled to Arbitration-

Following initiation of the lawsuit by AJP, Clark filed a Demand for Arbitration with the AAA on January 9, 2023. Clark's MTC ¶ 4. In the arbitration, Clark brought claims against AJP for its alleged default of the Subcontract and sought damages allegedly suffered due to the untimeliness and poor quality of AJP's work on the Project. *See* MTC Hearing Transcript, 5:9-12. While the arbitration was pending before the AAA, Clark moved to dismiss AJP's lien foreclosure action before the Trial Court or, in the alternative, to compel arbitration pursuant to the FAA. *See generally* Clark's Motion to Dismiss. The Honorable George M. McFaddin, Jr. granted Clark's Motion, staying the action and compelling arbitration between Clark and AJP. *See* Order to Stay and Compel Arbitration, issued June 22, 2023, 1. ("The Federal Arbitration Act ('FAA'), rather than the South Carolina Act, applies to the arbitration clause at issue and pre-empts any applicable state law because the agreement pertains to a transaction involving interstate commerce.") *Id.* at 2.

-Arch, AJP and Clark enter into Settlement Agreement Releasing AJP's Claims-

Contemporaneous to the South Carolina litigation and arbitration discussed above, Arch brought a separate lawsuit against Clark in the United States District Court for the Southern District of Mississippi, wherein Arch sought a declaratory judgment that Clark failed to satisfy conditions precedent to a claim against the Performance Bond due to AJP's alleged default under the Subcontract (the "Arch DJ Action."). *Arch Insurance Company v. Clark Construction, Inc. of Mississippi*, No. 5:22-cv-100-KS-BWR, 2023 WL 2762025 (S.D. Miss. Apr. 3, 2023). Clark

¹ Upon information and belief, Plaintiff/Respondent never served the Complaint on TCABC or Travelers.

asserted counterclaims against Arch seeking damages arising out of AJP's alleged default under the Subcontract. *See* MTC Hearing Transcript, 6:11-14.

During the pendency of both the AAA arbitration ordered by the Trial Court and the Arch DJ Action, Clark, AJP and Arch participated in a mediated settlement conference on July 6, 2023. Clark's Motion to Confirm Arbitration Order ¶ 5. A settlement agreement between Arch and Clark resulted from the mediation (the "Settlement Agreement"). *Id.* In this agreement, and in exchange for payment from Arch, Clark released its claims against AJP in arbitration and its counterclaims against Arch in the Arch DJ Action. *Id.* ¶ 6. Arch similarly released its claims against Clark in the Arch DJ Action and purported to release AJP's claims against Clark in arbitration while acting as AJP's attorney-in-fact pursuant to the Indemnity Agreement. *Id.* Clark then moved to dismiss the arbitration proceedings with prejudice, and AJP objected. *Id.* ¶¶ 7-8. On July 28, 2023, the Arbitrator granted Clark's Motion to Dismiss in spite of AJP's objection. *Id.* ¶ 9. AJP then filed a Motion to Reconsider before the Arbitrator on August 4, 2024, which was denied on August 9, 2023. *Id.* ¶ 10. The crux of AJP's objections to the Arbitrator's orders was that it contended Arch lacked authority to enter the Settlement Agreement on AJP's behalf and could not release AJP's claims against Clark. Clark's MTC ¶ 10, Ex. E. The Arbitrator denied AJP's Motion to Reconsider by Order dated August 9, 2023. Clark's MTC ¶ 10, Ex. F.

-Clark's Motion to Confirm the Arbitration Award-

On August 14, 2023, Clark, outlining the procedural posture of the arbitration, moved the Trial Court for an order confirming the order that the Arbitrator issued in the underlying arbitration. *See generally* Clark's MTC. In support of its MTC, Clark provided (a) the Settlement Agreement executed by the parties; (b) Clark's Motion to Dismiss the Arbitration Proceedings with Prejudice; (c) AJP's Response to Clark's Motion to Dismiss the Arbitration Proceedings with Prejudice; (d)

the Arbitrator's Order granting Clark's Motion to Dismiss the Arbitration Proceedings with Prejudice; (e) AJP's Motion to Reconsider the Arbitrator's Order Dismissing the Arbitration Proceedings with Prejudice; and (f) the Arbitrator's Order denying AJP's Motion to Reconsider. *See* Clark's MTC, Exs. A – F.

Importantly, AJP declined to file a Motion to Vacate the Arbitrator's Order which Clark's underlying Motion sought to confirm. However, AJP objected to Clark's Motion and the Trial Court issued an Order denying Clark's Motion. *See generally* Order issued January 10, 2024. Clark now appeals this ruling.

STANDARD OF REVIEW

“This Court may make its own ruling on a question of law without deferring to the circuit court.” *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 446, 748 S.E.2d 221, 224 (2013) (internal citations omitted). “Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.” *State Farm Mut. Auto. Ins. Co. v. Windham*, 438 S.C. 156, 159, 882 S.E.2d 754, 756 (2022) (quoting *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING CLARK'S TIMELY MOTION TO CONFIRM THE ARBITRATION AWARD AND ORDERING THE PARTIES BACK TO ARBITRATION WHERE AJP FAILED TO TIMELY RAISE A MOTION TO VACATE, MODIFY OR CORRECT THE ARBITRATION AWARD.

In 1925, Congress enacted the Federal Arbitration Act (the “FAA”) to “reverse the longstanding judicial hostility to arbitration agreements that had existed [in] English common law and [] adopted by American courts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 1651 (1991). Our United States Supreme Court has held that the FAA was enacted pursuant to Congress’ substantive power to regulate admiralty and interstate commerce under the Commerce Clause and was therefore a substantive body of law rather than procedural. *See Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S.Ct. 1801, 1806-07 (1967). In *Southland Corp. v. Keating*, the United States Supreme Court held that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” 465 U.S. 1, 10 (1984).

In 1978, the South Carolina General Assembly followed Congress’s directive by adopting the Uniform Arbitration Act of 1955. *See* S.C. Code Ann. §§ 15-48-10, *et seq.* (the “SCUAA”). The SCUAA largely mirrors the FAA and, like its federal counterpart, has specific requirements that must be followed with respect to judicial oversight of arbitration proceedings.

Clark followed the SCUAA and FAA mandates by moving to confirm the arbitration award; however, AJP never raised a motion to vacate, modify or correct the award. *See* S.C. Code Ann. §§ 15-48-110, 15-48-120. In other words, the only motion before the Trial Court was a

Motion to Confirm an Arbitration Award. Nonetheless, instead of confirming the Arbitration Award as required by the FAA and the SCUAA, the Trial Court strayed from the narrow review permitted by either Act and granted relief which was not authorized by statute. Specifically, in its January 10, 2024, Order, the Trial Court held that “[i]n reviewing an arbitration award for the purpose of confirmation or vacating the same, this Court must determine whether the arbitrator’s award demonstrates a manifest disregard for the law.” This was not the appropriate review in which the Trial Court was permitted to take. Under federal and South Carolina law, the Trial Court was required to confirm the award unless grounds to vacate, modify or correct the award were raised in a motion by the party opposing the award. *See* S.C. Code Ann. § 15-48-120. No such grounds were ever raised by AJP.

Instead, as a Hail Mary, on the morning of the November 27, 2023, hearing before Judge Goodstein, AJP asserted the same exact arguments it previously asserted in the underlying arbitration through a Memorandum in Opposition to Confirmation of the Arbitration Award. *See generally* AJP’s Response to Clark’s MTC. AJP argued that due to the lack of attestation by two witnesses, the Indemnity Agreement was unenforceable under South Carolina law, thus the Trial Court could not enforce the arbitration award. *Id.* at 4-5. In essence, AJP created a cloud of smoke at the last second to confuse an issue by arguing that the Arbitrator “manifestly disregarded the law.” However, such argument was not timely and therefore not properly before the Trial Court for consideration.

A. SCUAA applies to Clark’s timely motion to confirm the arbitration award.

It is well established in South Carolina that where a contract involves interstate commerce, state law regarding arbitration is supplanted by federal substantive law. *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) (citing *Osteen*

v. T.E. Cuttino Constr. Co., 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993)). Yet, in *Henderson v. Summerville Ford-Mercury, Inc.*, the South Carolina Supreme Court held that the confirmation process of an arbitration award is procedural rather than substantive, and therefore state law applies even where the substantive law of the FAA applies. *Henderson v. Summerville Ford Mercury, Inc.*, 405 S.C. 440, 450, 748 S.E.2d 221, 226 (2013).²

The SCUAA confirmation statute provides that “[u]pon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award.” S.C. Code Ann. § 15-48-120 (emphasis added).³

The statutory procedure under the SCUAA dictates that confirmation is mandatory, absent timely application by the party opposing confirmation. *Henderson*, 405 S.C. at 454, 748 S.E.2d at 228 (“[SC]UAA use[s] the word[] “shall” [] in directing that an award be confirmed upon application in the absence of a motion to vacate, modify, or correct the award, and such language is mandatory.”).

Here, Clark raised its motion to ask that the Trial Court to confirm the award. AJP did not file a timely motion to vacate, modify or correct the award. By entertaining AJP’s arguments against confirmation, the Trial Court effectively substituted its own judgment for that of the arbitrator and flouted the statutory directive under the SCUAA. The Trial Court was obligated to confirm the award. The Trial Court’s decision must be reversed.

² Where a state’s procedural rules conflict with or undermine the purpose of the FAA, they will be preempted. *Henderson*, 405 S.C. at 450, 748 S.E.2d at 227.

³ Similarly, under the FAA, “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” 9 U.S.C. § 9 (emphasis added).

B. The Trial Court erred by entertaining AJP’s arguments in opposition to confirmation of the arbitration award because AJP did not raise a timely motion to vacate, modify, or correct the Award.

Both the SCUAA and the FAA impose time limits on the party opposing confirmation of an arbitration award. *See* S.C. Code Ann. §§ 15-48-130(b) and -140(a); 9 U.S.C. § 12. The SCUAA requires that the party opposing confirmation file a motion⁴ (i.e., application) with the court within ninety (90) days after the award is filed or delivered. S.C. Code Ann. §§ 15-48-130(b) and -140(a). Likewise, the FAA imposes a similar three (3) month requirement to file an application after the award is filed or delivered. 9 U.S.C. § 12. The statutory requirements for filing a motion to vacate, modify, or correct the award must be strictly adhered to. *See Henderson*, 405 S.C. at 454, n. 7, 748 S.E.2d at 229, n. 7 (quoting *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (“stating the provision for judicial confirmation carries no hint of flexibility and the statement the court must grant the application unless the award is vacated, modified, or corrected is one which unequivocally tells courts to grant confirmation in all cases, except when one of the prescribed exceptions applies.”) (internal quotations omitted)).

Here, the SCUAA provides that “[a]n application [to] [vacate] *shall* be made within ninety days after delivery of a copy of the award to the application...” S.C. Code Ann. § 15-48-130(b). “The term ‘shall’ in a statute means that the action is mandatory.” *Henderson*, 405 S.C. at 454, 748 S.E.2d at 228 (citing *Wigfall v. Tideland Util., Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)). “Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.” *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). “[C]ase law clearly prohibits attempts to vacate, modify, or correct an

⁴ *See* S.C. Code Ann. § 15-48-170 providing that “an application to the court under [SCUAA] *shall* be by motion and *shall* be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions.” (emphasis added).

arbitration award once the statutory ninety-day limit has expired.” *Eatman's, Inc. v. Martin Eng'g, Inc.*, 311 S.C. 282, 284, 428 S.E.2d 736, 737 (Ct. App. 1993); *see also In re Patel*, C.A. No. 03-00132-W, Chapter 11, 2006 WL 4955603 (Bankr. D.S.C. Aug. 30, 2006) (South Carolina courts would not modify an arbitration award on non-statutory grounds, i.e., manifest disregard, after the statutory deadline to modify the award has lapsed) (dicta)). While AJP argues that the Trial Court should not confirm the Arbitrator’s award, AJP never filed a motion to vacate, modify, or correct the award. In fact, AJP only raised issue to the arbitration award on the day of the hearing through its memorandum in opposition and at oral arguments that same day. Such opposition occurred one hundred and twenty-two days after the arbitration award was issued, well over the ninety day or three-month time limits imposed by the SCUAA and the FAA, respectively. Because AJP did not fulfill the statutory requirements under either the FAA or SCUAA, it was improper for the Trial Court to consider vacating modifying or correcting the award. The Trial Court’s decision must be reversed.

C. The Trial Court exceeded its authority in ordering this case back to arbitration where such relief was neither requested nor anticipated by either Clark or AJP.

Since AJP did not raise a motion to vacate the Arbitrator’s Award, the Trial Court erred in directing this matter back to arbitration. The SCUAA allows for a rehearing by arbitration only upon: (1) application (i.e., motion) of a party to vacate an award; and (2) a determination by the trial court that the arbitration award should be vacated. *See* S.C. Code Ann. §§ 15-48-10, *et seq.* Section 130(c) of the SCUAA provides that:

In vacating the award on grounds other than stated in item (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 15-48-30, or, if the award is vacated on grounds set forth in items (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 15-48-30.

S.C. Code Ann. § 15-48-130(c).

Here, it is not clear what grounds the Trial Court used to justify its reasoning in sending this matter back to arbitration. In fact, it is not clear whether the Trial Court even vacated the entire award or instead simply directed that the award be modified or corrected. Still, the Court is not permitted to direct modification or correction of an arbitration award by sending the matter back to arbitration. *See* S.C. Code Ann. § 15-48-140 (“(a)...*the court shall* modify or correct the award”) (emphasis added).

Instead, the Trial Court determined: “**In reviewing an arbitration award for the purpose of confirmation or vacating of the same, this Court must determine whether the arbitrator’s award demonstrates a manifest disregard for the law....The Court agrees that Arch overstepped its authority by attempting to negotiate AJP’s claims against Clark...**” Order Denying Clark’s Motion to Approve at pp. 3-4.

Clark sought an explanation from the Trial Court on its decision to send the matter back to arbitration in Clark’s Motion to Reconsider. In its Order denying Clark’s Motion to Reconsider, no explanation was given by the Trial Court. Nor did the Trial Court explain its decision to send the matter back to arbitration in its initial Order Denying Clark’s Motion to Approve. South Carolina law, clearly and unequivocally, provides the manner in which an award is confirmed, modified, corrected, or vacated.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ENTERTAINING AND APPLYING AN INCORRECT STANDARD TO ITS REVIEW OF THE ARBITRATOR’S AWARD WHEN THE TRIAL COURT IMPLIED THAT THE ARBITRATOR MANIFESTLY DISREGARDED THE LAW GOVERNING THE VALIDITY OF THE SETTLEMENT AGREEMENT BETWEEN CLARK AND ARCH, A NON-PARTY TO THE ARBITRATION.

A. The law that AJP claims was manifestly disregarded involves parties and agreements outside the scope of the arbitration agreement, and therefore is not governing law in the arbitration proceeding.

As determined by the Honorable George M. McFaddin, Jr., in his June 22, 2023, Order, the underlying Subcontract affects interstate commerce and is thus governed by the FAA. This is consistent with the conflict of state and federal law with respect to arbitration agreements affecting interstate commerce. Unless the parties have contractually agreed otherwise, an arbitration agreement affecting interstate commerce is subject to the Federal Arbitration Act (FAA), 9 U.S.C. § 1, et seq.; *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S.Ct. 1248, 1252 (1989). While the interpretation of arbitration agreements is governed under contract law and thus the laws of each state, where such principles conflict with the underlying objectives of the FAA (i.e., the national policy favoring arbitration), state law will be preempted. *See Lamps Plus v. Varela*, 587 U.S. 176, 183, 139 S.Ct. 1407, 1415 (2019); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 1748 (2011) (“Although [9 U.S.C.] § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”).

Although “manifest disregard of the law” is not one of the specifically enumerated provisions outlined in the FAA’s confirmation statute (9 U.S.C. § 10), the Fourth Circuit has applied the standard to arbitration proceedings governed by the FAA, either as independent grounds for vacating the award or as “a ‘judicial gloss’ on §§ 10(a)(3) and (4).” *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 478 (4th Cir. 2012). To prove “manifest disregard” of the law, the party challenging the arbitrator’s award bears the burden of proving that “the arbitrators were aware of and understood the law, and found it applicable, yet chose to ignore it.” *Walnut Street*

Sec., Inc. v. Lisk, 497 F.Supp.2d 714, 724 (M.D.N.C. 2007) (citing *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 150 (4th Cir. 1994)). AJP argued that the Arbitrator’s decision not to consider the validity of the Settlement Agreement between Arch and AJP, citing lack of jurisdiction over the matter, was a manifest disregard of the governing law. AJP further argued that the power of attorney provisions in the Indemnity Agreement between Arch and AJP violate the South Carolina Uniform Power of Attorney Act, thus Arch did not have the authority to enter into the Settlement Agreement with Clark. MTC Hearing Transcript, 17:9-22.

However, the South Carolina Uniform Power of Attorney Act (the “Act”) is not governing law in the arbitration proceeding because the issue of the invalidity of the power of attorney provision of the Indemnity Agreement between Arch and AJP is not within the scope of the arbitration agreement between Clark and AJP. Section 20 of the Subcontract, signed by representatives for Clark and AJP, contains the arbitration provision. Clark’s Motion to Dismiss, Ex. A at 17-18. The provision requires arbitration of all claims “between the Contractor, Subcontractor, and all individual signatories ... arising out of or relating to [the] Subcontract” *Id.* The Contractor, Clark, and Subcontractor, AJP, were the only signatories to the contract. Therefore, the only claims fit for arbitration under the contract are those between Clark and AJP. The South Carolina Supreme Court has held that the “manifest disregard” standard requires “the governing law ignored by the arbitrator ... be well defined, explicit, and clearly applicable.” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 324 (2009) (citing *Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985)). AJP argues that the South Carolina Uniform Power of Attorney Act was manifestly disregarded by the Arbitrator, but that law is not “clearly applicable” to this proceeding because the parties involved in the Indemnity Agreement are not governed by the arbitration provision of the Subcontract.

AJP may counter that despite the issue not arising under the Subcontract, a “significant relationship” exists between the issue of the invalidity of the settlement agreement and the claims before the Arbitrator, which requires the arbitration clause to also apply to that issue. *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001) (citing *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996)). However, the expansion of an arbitration agreement to encompass issues with a “significant relationship” to those governed by the agreement is permitted only when the agreement is “broadly-worded.” *Id.* The arbitration agreement contained in the Subcontract between Clark and AJP is not “broadly-worded” because it specifically delineates the scope of the agreement to cover only disputes between the Contractor, Subcontractor, and all individual signatories to the Subcontract, which excludes issues between any of those parties and a third party, such as Arch.

B. The Trial Court incorrectly implied that the Arbitrator’s ruling and Arch’s release of AJP’s claims prejudiced AJP.

During the Hearing on Clark’s MTC, the Trial Court expressed concern “about the failure of AJP to be able to prosecute its claim against Clark.” MTC Hearing Transcript 33:7-9. This concern is misplaced. To the extent AJP contends Arch violated the terms of its indemnity agreement by entering the Settlement Agreement and releasing AJP’s claims (which Clark disputes), litigation between AJP and Arch is the proper forum for resolution of that dispute.

To that end, AJP has in fact asserted claims against Arch *seeking the very same damages* it seeks against Clark in the underlying action. *Arch Insurance Company v. AJP Solutions, LLC*, Case No. 2:23-cv-03735-RMG was filed in the United States District Court for the District of South Carolina on August 1, 2023 (the “Arch Indemnity Action”), wherein Arch sought relief under the Indemnity Agreement for damages it allegedly incurred by virtue of its issuance of payment and performance bonds to AJP, including but not limited to the settlement payment made

to Clark pursuant to the Settlement Agreement. *See generally* Compl., *Arch Ins. Co. v. AJP Solutions, LLC* (D.S.C. Aug. 1, 2023) (No. 2:23-cv-03735-RMG).

AJP asserted counterclaims against Arch, alleging *inter alia* that “Clark and Arch came to an agreement whereby Arch claimed to settle not only the claims Clark had filed against AJP in the arbitration but also all claims AJP maintained against Clark,” and “[a]s a proximate result of Arch’s tortious interference with the contractual agreement between AJP and Clark in the arbitration proceedings, AJP has suffered considerable harm to its business, including but not limited to a loss of \$626,429.28 in actual damages in regards to the [Mechanic’s Lien] amount, attorneys’ fees, emotional distress and harm of the individual members of the organization, and further consequential damages in such amounts to be proven at trial.” Answer to Pl.’s Am. Compl. ¶¶ 61, 66, *Arch Ins. Co. v. AJP Solutions, LLC* (D.S.C. Aug. 1, 2023) (No. 2:23-cv-03735-RMG).

Evidently, Arch and AJP have reached a settlement agreement⁵ in the Arch Indemnity Action and a Notice of Settlement was filed by Arch on February 8, 2024. *See* Arch’s Notice of Notice of Settlement, *Arch Ins. Co. v. AJP Solutions, LLC* (D.S.C. Aug. 1, 2023) (No. 2:23-cv-03735-RMG). The parties entered a voluntary dismissal of the Arch Indemnity Action without prejudice on April 18, 2024. *See* Stipulation of Dismissal Without Prejudice, *Arch Ins. Co. v. AJP Solutions, LLC* (D.S.C. Aug. 1, 2023) (No. 2:23-cv-03735-RMG). Thus, AJP has exercised its opportunity to recover from Arch from any perceived wrongdoing by the execution of the Settlement Agreement.

⁵ The terms of the AJP/Arch settlement are unknown to Clark.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY MAKING LEGAL AND FACTUAL FINDINGS OF AGENCY IN REVIEWING THE POWER OF ATTORNEY PROVISION IN THE INDEMNITY AGREEMENT BETWEEN ARCH AND AJP WHILE APPLYING THE WITNESS REQUIREMENTS OF S.C. CODE ANN. § 62-8-105 TO THE INDEMNITY AGREEMENT BETWEEN ARCH AND AJP THAT CREATED A POWER COUPLED WITH AN INTEREST.

AJP incorrectly asserted, and the Trial Court incorrectly agreed, that the South Carolina Uniform Power of Attorney Act governs the execution of the Indemnity Agreement. S.C. Code Ann. § 62-8-101, *et seq.* AJP argued the Indemnity Agreement is unenforceable under South Carolina law because it was not attested to by two disinterested witnesses. *See* S.C. Code Ann. § 62-8-105. Yet, AJP does not dispute that it signed the Indemnity Agreement, nor does AJP assert that the Indemnity Agreement was induced by fraud, or that any other contractual grounds would deem the Indemnity Agreement unenforceable under South Carolina law. In fact, AJP's arguments, and the Trial Court's ruling, fail to consider the very underlying principles of agency or power of attorney. Moreover, AJP's arguments and the Trial Court's ruling specifically overlook the very statutory language within the Act which dictates that the Indemnity Agreement is not subject to the Act.

Here, the Indemnity Agreement at issue is an irrevocable power of attorney coupled with a security interest. The language in it and the very relationship between Arch and AJP is significant.

Assignment: ...Indemnitor assigns and pledges to Surety as security, a lien and security interest in its interest, title, and rights in and growing out of the following...

Power of Attorney: Indemnitor *irrevocably* appoints Surety as Attorney-in-fact with the full right and authority, but not the obligation, to exercise the rights of Indemnitor assigned to Surety above, and to execute on behalf of and sign Indemnitor's name to any document deemed necessary by Surety to give full effect to the purposes of the Agreement. Indemnitor hereby ratifies all acts taken by Surety as attorney-in fact, *acknowledges that this power of attorney is a power*

coupled with an interest, and agrees to hold harmless Surety from any claims, damages, loss or expense incurred by its use.

Clark's MTC, Ex. B ¶¶ 5, 7 (emphasis added).

Specifically, the South Carolina Uniform Power of Attorney Act does not apply to “[a] power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction.” S.C. Code Ann. § 62-8-103(1). Black's Law Dictionary Defines “Power of Attorney” as “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor.” Power of Attorney Definition, *Black's Law Dictionary* (11th ed. 2019). At law and in equity the ordinary power of attorney is revocable and is terminable upon death or incapacity of the principal. *Johnson v. Johnson*, 27 S.C. 309, 3 S.E. 606 (1887). The durable power of attorney creates an exception which allows an agent to act on behalf of the principal after the principal's death or incapacity.

Here, AJP and the Trial Court misconstrue the purpose of power of attorney and principals of agency, requiring the disinterested witness signatures under S.C. Code Ann. § 62-8-105, with an irrevocable power of attorney in an Indemnity Agreement between a surety and its principal.⁶ Arch is not AJP's agent, it is AJP's surety and extends surety credit to AJP as a function of that relationship. As such, Arch is not holding a power for the benefit of AJP.

A “power coupled with an interest” is a power to do some act, conveyed along with an interest in the subject matter of the power. *Jozefowicz v. Allstate Ins. Co.*, 35 Cal.App.5th 829, 836, 247 Cal.Rptr.3d 758, 763 (2019) (citing *Hunt v. Rousmanier*, 27 U.S. 174, 5 L.Ed 589 (1823)). A power coupled with an interest is not held for the benefit of the principal. *Id.* When the purpose

⁶ Clark is informed and believes that requiring an irrevocable power of attorney in an indemnity agreement between a surety and its principal to be attested by two disinterested witnesses would constitute a significant deviation from the routine procedures used to execute indemnity agreements in the surety industry.

of the power of attorney “is to protect the *agent’s* interest in the subject and its value ... the creator of the power relinquishes irrevocably any authority to direct the attorney-in-fact who is permitted ... to act solely in his own interests.” *Bonfigli v. Strachan*, 192 Cal.App.4th 1302, 1309, 122 Cal.Rptr.3d 447, 453 (2011).

A power given as security creates neither a relationship of agency as defined in § 1.01 nor actual authority as defined in § 2.01, although the power enables its holder to affect the legal relations of the creator of the power. The power arises from a manifestation of assent by its creator that the holder of the power may properly create liability against the creator, or dispose of property or other interests of the creator, or perfect or otherwise protect a title already held by the holder of the power or the person for whose benefit the holder is to act. If the power is given as security for the performance of a duty, it must be supported by consideration, but consideration is not necessary if the power is given to facilitate transfers of title to the power holder.

Restatement (Third) of Agency, § 3.12, cmt. B (2006).

The Indemnity Agreement provides that the “power of attorney is a power coupled with an interest,” which gives the surety the authority to execute on behalf of the indemnitor(s) any document necessary under the terms of the Indemnity Agreement. Therefore, the Indemnity Agreement gave Arch the authority to resolve claims against itself as well as the indemnitors (including AJP) arising out of the subject matter of the bonds. The purpose of that power was not to protect AJP or the other indemnitors, but instead to protect Arch’s own interests by alleviating the financial risk assumed by acting as AJP’s surety under the Payment and Performance Bonds.

Thus, the Indemnity Agreement falls within the exception set forth in S.C. Code Ann. § 62-8-103(1) and the requirements of S.C. Code Ann. § 62-8-105 are not applicable. Since the South Carolina Probate Code attestation requirements are inapplicable, the Indemnity Agreement was properly executed, and Arch was authorized to enter into the settlement agreement with Clark on behalf of AJP.

CONCLUSION

The Trial Court erred in ignoring South Carolina statutory and common law, and improperly applying the “manifest disregard of the law” standard in vacating the arbitration award. For the reasons stated, this Court should reverse the judgment of the Trial Court.

Respectfully submitted,

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/s/ Bryan P. Kelley

Bryan P. Kelley (SC Bar No. 76062)
H. Drennan Quattlebaum (SC Bar No. 106418)
Elmore Goldsmith Kelley and deHoll, P.A.
19 Blair Street (29607)
Post Office Box 1887
Greenville, South Carolina 29602
Telephone: (864) 255-9500
Facsimile: (864) 255-9505
bkelley@elmoregoldsmith.com
dquattlebaum@elmoregoldsmith.com

Counsel for Appellant