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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod IV, Circuit Court Judge

Appellate Case No.: 2024-000489

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212 Motors Holding Group, LLC, 212 Motors Columbia, LLC, 212 Motors Florence, LLC, Team 212 Columbia, LLC, and Team 212 Florence, LLC ..... Appellants,

v.

Adam Maisano .....Respondent.

INITIAL BRIEF OF RESPONDENT

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II. Whether, if Appellants preserved the issue, the circuit court properly considered the exhibits in the record attached to Respondent's memorandum of law, and if not, whether Appellants are prejudiced from the circuit court's consideration of such evidence?

COUNTERSTATEMENT OF THE CASE

This appeal arises out of a dispute between the members of Appellants 212 Motors Holding Group, LLC, 212 Motors Columbia, LLC, Team 212 Columbia, LLC, and Team 212 Florence, LLC ("212 Motors" or "the Company"). To resolve the dispute, the Company agreed to buy Respondent Adam Maisano's interest in 212 Motors in late 2022. But when the parties could not agree on the value of Maisano's interest, 212 Motors filed this lawsuit against Maisano on March 3, 2023. (Compl.). Before Maisano answered, 212 Motors moved to stay the case and to compel arbitration pursuant to the Company's Operating Agreement. Maisano consented, and the circuit court issued a Consent Order on May 24, 2023, staying the case pending arbitration and appointing John E. Cuttino as arbitrator ("the Arbitrator"). (Order Compelling Arbitration).

On June 6, 2023, the parties executed a Combined Certificate of Action (the "CCA"), which set forth the rules and procedure for the arbitration. (Combined Certificate of Action). The Arbitrator was to select a third appraiser (the "Appraiser") to value Maisano's membership interest and to order 212 Motors to buy Maisano's interest in the Company in accordance with that valuation. (*Id.*). The parties agreed in the CCA they would accept the valuation as "definitive and binding." (*Id.*).

The Appraiser issued a valuation report on November 6, 2023, valuing the fair value of 212 Motors as $746,000.00. (Nov. Appraisal Report). 212 Motors immediately took issue with the report and demanded it be revised. Later, the Appraiser issued a supplemental valuation report on December 21, 2023, which valued Maisano's individual fair market value of his interest in 212 Motors as $189,000.00. (Dec. Appraisal Report).

Despite repeated requests to set a closing date after that, 212 Motors refused to close on Maisano's interest, citing continued disagreement with the valuation. As a result, Maisano was

forced to move before the Arbitrator to issue an award in accordance with the CCA. (Jan 16–23, 2024 Email Chain); (Jan. 18–19, 2024 Email Chain). On January 29, 2023, the Arbitrator issued an award requiring 212 Motors to conduct the closing—the buyout of Maisano's membership interest—"no later than 6PM Eastern time on Thursday, February 1, 2024" (the "Award"). (Arbitration Award). But 212 Motors still refused to comply.

Maisano filed a motion to lift the stay, to compel enforcement of the Award and for sanctions in the form of attorney's fees on February 2, 2024. (Mot. & Mem. in Support). The circuit court heard arguments on the motion on February 28, 2024, and took the issues under advisement. After the parties submitted proposed orders, the circuit court issued an order granting Maisano's motion in part,[1] lifting the stay, confirming the Arbitrator's Award, and ordering 212 Motors to buy Maisano's membership interest in the Company for a value of $189,000 within three business days. (Confirmation Order). 212 Motors again refused to comply, so Maisano filed a motion for a rule to show cause on March 14, 2024, and a memorandum in support on March 20, 2024. (Mot. for Rule to Show Cause); (Mem. in Support). On March 22, 2024, 212 Motors filed a memorandum in opposition to the motion for a rule to show cause. (Mem. in Opp.). That same day, and while that motion was pending, 212 Motors filed a notice of appeal. (Notice of Appeal).

[1] The circuit court denied Maisano's request for sanctions in the form of attorney's fees.

STATEMENT OF THE FACTS

212 Motors is a group of limited liability companies in the used car business that are owned and operated by four members: Rod Slick, Jonathan Sanchez, Michael Love,[2] and Adam Maisano. (Compl.). In November 2022, a dispute arose among the members regarding management and day-to-day operations of 212 Motors. (*Id.*). Soon after, the parties recognized they could no longer be in business together and agreed the remaining members of 212 Motors would buy Maisano's interest pursuant to the transfer provision of the Company's Operating Agreement. (*Id.*). Importantly, once the parties reached this decision, Maisano ceased involvement in the management of the Company.

To facilitate Maisano's buyout, Maisano and the remaining members separately hired appraisers to value Maisano's interest under section 8.3 of the Operating Agreement. (*Id.*).; (Operating Agreement at § 8.3) ("The Offering Member and the LLC shall each select one (1) appraiser to determine the Interest Value of the Offered Interest. If the two (2) appraisers so selected cannot agree upon the Interest Value of the Offered Interest, the two (2) appraisers shall select a third appraiser, whose decision in this matter shall be conclusive."). The appraisals came back in early 2023 but were vastly different. (Compl.). Of course, both sides disputed the validity of the valuations performed by the other side.

After weeks without movement, the remaining members filed this lawsuit on behalf of 212 Motors on March 3, 2023, seeking, as relevant here, judicial dissociation and judicial determination of Maisano's interest in the company. (Compl.). Eventually, the circuit court stayed the case on consent of the parties and compelled arbitration pursuant to section 12.14 of the Operating Agreement. (Order Compelling Arbitration); (Operating Agreement at § 12.14). In the

[2] Slick, Sanchez, and Love will be referred to throughout this brief as "the remaining members."

consent order, the circuit court also appointed the Arbitrator—John E. Cuttino. (Order Compelling Arbitration).

On June 6, 2023, the parties executed the CCA, which set forth the rules and agreements for the arbitration. (Combined Certificate of Action). The purpose of arbitration—as expressed and agreed to by the parties in the CCA—was for the Arbitrator to select a third appraiser to value Maisano's membership interest in 212 Motors and to order 212 Motors to buy Maisano's membership interest in the Company in accordance with that appraisal value. (*Id.*). The parties expressly agreed the Appraiser would value "the Company and the Interest Value of Maisano's membership interests in the Company as of December 31, 2022" and that the parties would accept that Appraiser's valuations as "definitive and binding." (*Id.*). And, per the CCA, 212 Motors was to buy Maisano's membership interest at a closing "[n]o later than 30 days following the appraiser's determination of the Interest Value of Maisano's membership interests." (*Id.*).

Both parties then submitted candidates for consideration as appraiser. On June 16, 2023, the Arbitrator selected Maisano's candidate: Stuart McCallum, ASA at WithumSmith+Brown, PC. On July 28, 2023, 212 Motors sent the necessary documents to the Appraiser so the appraisal process could begin.

After several months of back forth, the Appraiser issued a valuation report on November 6, 2023, valuing the fair value of 212 Motors as $746,000.00, meaning Maisano's interest would be worth $248,666.67. (Nov. Appraisal Report). The remaining members immediately challenged this report, disagreeing with the valuation on various grounds, including, but not limited to, the methodology employed and the fact the report valued the company as a whole, rather than Maisano's individual interest. (Letter from G. Studemeyer); (Letter from B. Gooding). The Arbitrator allowed them to voice their concerns, both in writing and on a conference call with the

Appraiser. (*Id.*); (Nov. 10, 2023 Email and Report Questions). Then, on December 21, 2023, the Appraiser issued a supplemental valuation report, which valued Maisano's individual fair market value of his interest in 212 Motors as $189,000.00, which accounted for a 23.5% discount for his non-controlling 33.33% interest. (Dec. Appraisal Report).

Despite repeated requests to set a closing date after that, the remaining members refused to close, citing continued disagreement with the valuation method. This time, they objected to how the Appraiser handled the Company's liabilities in valuing Maisano's interest, even though the Operating Agreement sets forth a *nonexclusive* list of factors the Appraiser should consider when determining a member's interest. (Jan 16–23, 2024 Email Chain); (Jan. 18–19, 2024 Email Chain); *see also* (Operating Agreement at § 8.3). Maisano disagreed and sought to close on his interest through a buyout under the CCA. The remaining members refused. As a result, Maisano moved the Arbitrator to issue an award requiring 212 Motors and the remaining members to comply with the CCA, including recognizing the Appraiser's valuation was, and accepting it, as "definitive and binding." (Jan 16–23, 2024 Email Chain); (Jan. 18–19, 2024 Email Chain).

On January 29, 2023, the Arbitrator issued the Award, requiring the remaining members of 212 Motors to conduct the closing—the buyout of Maisano's membership interest—"no later than 6PM Eastern time on Thursday, February 1, 2024." (Arbitration Award). As for the valuation of Maisano's individual interest and the remaining members' dispute with it, the Arbitrator confirmed the Appraiser's supplemental valuation—$189,00.00—as follows:

> The valuation set forth in Withum's supplemental valuation report of December 21, 2023 is binding upon the parties. The specific agreement of the parties to be bound appears to have no contingency or provision for objection. Rather, it is admitted by all that the parties have widely divergent opinions on the valuation of Maisano's interest, and that language appears to be intended specifically to avoid unending disagreement about the valuation. This arbitration decision, however, does not turn disproportionally

> on the aforesaid "definitive and binding" provision. *The valuation process inherently includes matters of opinion upon which reasonable minds and experts can disagree, as has happened here. If the valuation was subject to a specific mathematical formula with static components, there presumably would never be any disagreement on valuation*.

(*Id.*) (emphasis added). The next day, however, 212 Motors' counsel emailed the undersigned and the Arbitrator, stating "[t]here will be no closing." (*Id.*).

Maisano filed a motion to lift the stay, to compel enforcement of the Award and for sanctions in the form of attorney's fees on February 2, 2024. (Mot. & Mem. in Support). The circuit court heard arguments on the motion on February 28, 2024, and took the issues under advisement. After the parties submitted proposed orders, the circuit court issued an order granting Maisano's motion in part, lifting the stay, confirming the Arbitrator's Award, and ordering 212 Motors to buy Maisano's membership interest in the Company for a value of $189,000 within three business days. (Confirmation Order).

212 Motors again refused to comply with the circuit court's order, so Maisano filed a motion for a rule to show cause. (Mot. for Rule to Show Cause). While that motion was pending, 212 Motors filed a notice of appeal on March 22, 2024. (Notice of Appeal).

STANDARD OF REVIEW

"Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "The scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all." *Grp. III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 149, 819 S.E.2d 781, 785 (Ct. App. 2018) (internal quotation marks omitted) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007)). "Indeed, 'broad judicial review on the merits would render resort to arbitration wasteful and superfluous.'" *Swentor v. Swentor*, 336 S.C. 472, 484, 520 S.E.2d 330, 337 (Ct. App. 1999) (citation omitted).

Under the Uniform Arbitration Act, "[a]n award will be vacated only under narrow, limited circumstances, inter alia, 'when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.'" *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *see also* S.C. Code Ann. § 15-48-130(a)(3).

ARGUMENT

The primary issue before the Court is whether the Arbitrator exceeded his power under the CCA by somehow disregarding or perversely misconstruing the parties' contracts in considering the Appraiser's valuation as "definitive and binding" and ordering Appellants to buy Maisano's membership interest in accordance with that value. He did not. Appellants' gripe is simple: they do not like the Appraiser's valuation. But they ignore that they agreed in the CCA to accept the valuation as "definitive and binding." They would have this Court not only invade the province of the arbitration but also the merits of the underlying appraisal to find otherwise. This, the Court cannot do.

I. The Arbitrator did not exceed his authority under the CCA because he did not manifestly disregard or perversely misconstrue any law in finding the Appraiser's valuation of the Interest Value of Maisano's membership interest definitive and binding.

The parties do not dispute that the Operating Agreement and the CCA are contracts by and between them. *See* Appellants' Br. at 10. Nor do they dispute that the Arbitrator had the authority to order a closing under the CCA when the Appraiser valued the Interest Value of Maisano's membership interest in 212 Motors. *See* Appellants' Br. at 11. Yet Appellants contend the Arbitrator exceeded his authority under the CCA by ordering the parties to proceed to a closing to buy Maisano's membership interest in accordance with the Appraiser's valuation. In doing so, Appellants contend the Appraiser never determined the Interest Value of Maisano's membership interest, so the Arbitrator should not have ordered a closing when he did. Not so.

An arbitrator exceeds his power under section 15-48-130(a)(3) only if the arbitrator "manifestly disregards or perversely misconstrues the law." *C-Sculptures, LLC*, 403 S.C. at 56, 742 S.E.2d at 360 (quoting *Gissel*, 382 S.C. at 241–42, 676 S.E.2d at 323). Our supreme court recently reaffirmed "the rare and narrow basis upon which [a court] may disturb an arbitration

award" under this high standard. *Waldo v. Cousins*, Op. No. 28201 (S.C. Sup. Ct. filed May 1, 2024) (Howard Adv. Sh. No. 16 at 16–17). The court stated:

> When the attack on the award claims the arbitrator failed to follow controlling law, we may only vacate the award where the arbitrator *knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it*. . . . In such circumstances, we have held the arbitrator exceeded his power by manifestly disregarding or perversely misconstruing the law governing the dispute. . . . This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it. . . . This complements the well-known rule that the form of the award need not be accompanied by any reasoning, so long as the award can be reconciled with factual inferences and legal conclusions that are at least "barely colorable."

Id. (internal citations omitted) (emphasis added). Thus, the Court can vacate an arbitration award under section 15-48-130(a)(3) only if the arbitrator "knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it." *Id.*

A. The Arbitrator did not refuse to apply any well-defined, explicit, or clearly applicable controlling law.

Because this dispute arises from the buyout of Maisano's membership interest, the controlling law is found in the Operating Agreement and the CCA. Beginning with the latter, the CCA sets forth the rules and procedures agreed to by the parties for the arbitration process. The parties agreed in the CCA that the Company would buy Maisano's membership interest at his "'Interest Value,' as that term is defined in § 8.3 in each operating agreement executed for the above-mentioned companies." (Combined Certificate of Action). In relevant part, the CCA then provides:

> I. The undersigned Members agree to submit the selection of an appraiser to arbitration;
>
> . . .

> V. The undersigned Members agree that the arbitrator's choice of appraiser will be definitive;
>
> . . .
>
> VIII. The undersigned Members agree that the appraiser will value the company and the Interest Value of Maisano's membership interests in the Company as of December 31, 2022;
> VI. The undersigned Members agree that they will accept the valuations determined by the appraiser as definitive and binding;
> VII. The undersigned Members agree that no later than 30 days following the appraiser's determination of the Interest Value of Maisano's membership interests, the purchase of Maisano's membership interest by the Company will take place at a closing pursuant to § 8.5 of the operating agreement[].

(Combined Certificate of Action).

As stated, section 8.3 of the Operating Agreement defines "Interest Value" and provides that it is equal to:

> the fair market value of the Offered Interest . . . and considering the fair market value of the LLC's assets, less an imputed sales commission equal to seven percent (7%) of the fair market value of the LLC's assets; the amount of LLC liabilities; the percentage of ownership represented by that Offered Interest; and the Offering Member's Capital Account, and debt obligations owed to and by the Offering Member to the LLC.

(Operating Agreement at § 8.3). Once the Appraiser valued that interest, according to the CCA, the parties were to "accept the valuations determined by the appraiser as definitive and binding." (Combined Certificate of Action).

The Appraiser issued his supplemental valuation on December 21, 2023, valuing Maisano's interest in 212 Motors as $189,000.00. (Dec. Appraisal Report). At that time, Appellants had an obligation under the CCA to "accept the valuations determined by the appraiser as definitive and binding." But they refused and argued to the Arbitrator that they did not have to comply because they didn't agree with the methodology employed and the value concluded by the Appraiser. (Jan. 18–19, 2024 Email Chain).

Appellants improperly asked the Arbitrator and the circuit court—and now this Court—to wade into the Appraiser's valuation to determine whether he did it accurately. But the fact of the matter is that the Appraiser stated in his supplemental appraisal report that he "determine[d] the fair market value ("FMV") of Adam Maisano's 33.33% interest (the "Subject Interest") in 212 Motors Holding Group LLC ("212 Motors") as of December 21, 2022 (the "Valuation Date") in accordance with section 8.3 of the 212 Motors Holding Group Operating Agreement (the "Operating Agreement")." (*Id.*). That is what the CCA and section 8.3 of the Operating Agreement required, regardless of whether the Appraiser used the term "Interest Value."

Apparently, Appellants wanted the Arbitrator to make a specific finding that the Appraiser determined the Interest Value of Maisano's membership interest. *See* Appellants' Br. at 14. That is neither required nor necessary. The Arbitrator did not have to explicitly state the Appraiser determined the Interest Value of Maisano membership interest as he clearly believed the Appraiser did: he ordered the parties to close. *See Waldo*, Op. No. 28201 (Howard Adv. Sh. No. 16 at 17) (reciting the "well-known rule that the form of the award need not be accompanied by any reasoning, so long as the award can be reconciled with factual inferences and legal conclusions that are at least 'barely colorable'" (*Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985))). And if it wasn't already abundantly clear from the many attempts to proceed to closing and sell his interest, Maisano does too. *But see* Appellants' Br. at 11.

With the Interest Value of Maisano's membership interest determined, Appellants had to accept it as "definitive and binding" and to proceed to a closing as ordered by the Arbitrator. The Arbitrator ignored neither the Operating Agreement nor the CCA in making that ruling. The Arbitrator interpreted the "definitive and binding" language in the CCA and found the CCA had "no contingency or provision for objection. Rather, it is admitted by all that the parties have widely

divergent opinions on the valuation of Maisano's interest, and that language appears to be intended specifically to avoid unending disagreement about the valuation." (Arbitration Award). "This left no room for quibbling about the valuation or methodology after [the Appraiser] determined the value of Maisano's interest." (Confirmation Order at 8).

It is no secret Appellants disagree with the Arbitrator's interpretation of this provision and the circuit court's confirmation of his interpretation. But "[e]ven a 'clearly erroneous interpretation of the contract' cannot be disturbed." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. In any event, the Arbitrator's interpretation of the "definitive and binding" provision in the CCA "was more than reasonable," (Confirmation Order at 8), and certainly not an "intentional or reckless flouting of the law," *Waldo*, Op. No. 28201 (Howard Adv. Sh. No. 16 at 17). To be sure the CCA's purpose "as is the purpose of most arbitrations—was 'to proceed with the valuation and sale of Maisano's membership interests in a fair and expeditious manner.'" (Confirmation Order at 8). To allow Appellants to come back after the fact and argue about the Appraiser's valuation would run afoul of the parties' agreement and the purpose of the arbitration proceeding.

In any event, the Arbitrator did not stop his analysis after interpreting the "definitive and binding" language. (Arbitration Award) (stating that his decision did "not turn disproportionally on the aforesaid 'definitive and binding' provision"). He continued and considered Appellants' argument about the valuation too, stating "[t]he valuation process inherently includes matters of opinion upon which reasonable minds and experts can disagree, as has happened here. If the valuation was subject to a specific mathematical formula with static components, there presumably would never be any disagreement on valuation." (*Id.*).

Appellants seem to agree with the Arbitrator that determination of the Interest Value of Maisano's membership interest is necessarily a subjective one. *See* Appellants' Br. at 13 ("As is

immediately apparent from its definition in the Operating Agreement, an appraiser must exercise a degree of subjectivity with some of the considerations in order to determine the Interest Value of membership interests."). But then they want to argue about the merits of whether the *non-exhaustive* considerations in section 8.3 are mandatory.[3] (*Id.* at 12–13). That goes directly against the Court's review of an arbitration award and the parties' agreement in the CCA that the valuation would be "definitive and binding." The Arbitrator found the valuation was subjective. (Arbitration Award). That finding is more than a "barely colorable" interpretation of the Operating Agreement and the CCA, and this Court—like the circuit court—should refuse to second guess it. *See Trident Tech. Coll.*, 286 S.C. at 109, 333 S.E.2d at 788.

At the end of the day, in order to avoid the cost, headache, and time involved with litigation, the parties agreed to submit this dispute to arbitration under a streamlined process to value and buy Maisano's interest. In doing so, they agreed the Appraiser's valuation would be "definitive and binding," which meant there was "no room for quibbling about the valuation or methodology" afterwards. (Confirmation Order at 8). Yet that is all Appellants have done. The Arbitrator did not exceed his authority under the CCA by refusing to entertain such antics, confirming the Appraiser's valuation of Maisano's membership interest, and ordering the parties to proceed to a closing. The circuit court thus properly confirmed the Award, and this Court should put a stop to Appellants' never-ending refusal to honor their agreement and affirm the Award too.

[3] They also want to parse the considerations and argue about which ones are subjective or discretionary. (*Id.*). That belated argument is not preserved, however, because Appellants never made it to the Arbitrator. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."); *I'On, LLC. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.").

II. Appellants' argument that the circuit court erred in considering all the exhibits presented to it is unpreserved and without merit.

The admission of evidence is "largely within the [circuit] court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." *See First Citizens Bank & Tr. Co. v. Park at Durbin Creek*, 419 S.C. 333, 339, 797 S.E.2d 409, 412 (Ct. App. 2017) (alteration in original) (citation omitted). Appellants, nevertheless, argue the circuit court erred in "considering the exhibits submitted by the Respondent as evidence properly before it." Appellants' Br. at 17. This argument fails on several accounts.

First, Appellants did not raise a specific objection to *any* of the exhibits attached to Maisano's memorandum in support of his motion. During the hearing, Appellants' counsel made the boilerplate statement that Maisano filed exhibits "with a memorandum, which means it's not in evidence." Tr. at 20:6–7. For whatever that is worth, it does not sufficiently raise and preserve an evidentiary objection for appeal. *See* Rule 103(a)(2), SCRE (stating "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection . . . [states] the specific ground of objection, if the specific ground was not apparent from the context"); *see also State v. Daise*, 421 S.C. 442, 450, 807 S.E.2d 710, 714 (Ct. App. 2017) ("In order to preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." (quoting *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001))).

Second, the undersigned addressed that puzzling statement at the end of the hearing, and the circuit court confirmed that the exhibits filed with the memorandum were in the court record now and that the court would "take it for what I think it's worth for now." Tr. at 52:1–7. Appellants' counsel responded: "I don't care what the Court looks at. I mean, not I don't care, but

what I would do is offer up letters and the e-mails . . . , and if the Court will take this into consideration *along with everything else, then that's fair*." Tr. at 52:11–16. Thus, even if Appellants raised a proper objection to Maisano's exhibits at the beginning of the hearing, their counsel later conceded that the circuit court could "fair[ly]" consider their exhibits along with Maisano's exhibits. *See, e.g.*, *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (stating an "issue conceded in trial court cannot be argued on appeal" (citation omitted)).

Third, even if this issue is preserved for this Court's review, it is unclear what "statements" and "exhibits attached to the memorandum" the circuit court considered that Appellants thought it shouldn't have. Their brief doesn't say, and it is too late to identify such statements or exhibits now. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an appellant abandons an issue on appeal when he fails to "provide arguments or supporting authority" in his initial brief); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (stating one "may not use the reply brief to argue issues not argued in his brief in chief"). To be sure, some exhibits Maisano filed with his memorandum in support are identical to exhibits Appellants filed with their memorandum in opposition. Surely, they do not take issue with the circuit court considering those exhibits.

Fourth, this argument lacks merit. For one, it ignores what occurs in motions practice in every circuit court in this State. Our circuit courts consider motions of all kinds based on exhibits attached to the motion or a memorandum of law.[4] *Cf. Gecy v. Somerset Point at Lady's Island Homeowners Ass'n*, 426 S.C. 540, 556, 828 S.E.2d 73, 82 (Ct. App. 2019) (stating that, in granting

[4] Considering the lawyer–witness rule, it was more improper for Appellants' counsel to submit an affidavit sponsoring evidence. *See* (Aff. of J. Bradley Studemeyer at ¶ 1) (stating "he is an attorney for the Plaintiffs in the above-captioned action" and purporting to sponsor nine exhibits); *see also* Rule 3.7, SCRPC, Rule 407, SCACR.

summary judgment, the circuit court considered "each party's arguments, memorandum, and exhibits"). If Appellants had a specific objection to the circuit court's consideration of any of Maisano's exhibits, then they could have made one. Merely saying the exhibits are not evidence does not suffice. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) ("The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge."). For another, the circuit court here sat in an appellate-like position to review what occurred in arbitration, not to try the case in the first instance. During arbitration and before issuing the Award, the Arbitrator had reviewed the documents—and several times participated in the emails—that Maisano attached to his memorandum of law in support of his motion. There is nothing improper about the circuit court considering them in confirming the Award.

Fifth, even if this argument is preserved and has any merit, Appellants have not articulated why or how the circuit court's consideration of Maisano's exhibits resulted in any prejudice to them. "To warrant a reversal based on the admission of evidence, the appellant must show both error and *resulting prejudice*." *Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009) (emphasis added) (citing *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001)). Again, it is too late now. *See First Sav. Bank*, 314 S.C. at 363, 444 S.E.2d at 514; *Fields*, 312 S.C. at 106, 439 S.E.2d at 285.

Therefore, should the Court reach this unpreserved argument, it should find that the circuit court did not abuse its discretion in "considering the motion, memoranda in support and in opposition as well as supporting exhibits, and arguments of counsel" in confirming the Arbitrator's Award. (Confirmation Award).

CONCLUSION

The Arbitrator did not exceed his authority by accepting the Appraiser's valuation of Maisano's membership interest as "definitive and binding" and ordering the parties to proceed to a closing in accordance with the CCA. The parties agreed to arbitration under the ground rules set forth in the CCA to avoid protracted litigation. To allow Appellants to go through that entire process only to ignore the Award and refuse to complete their obligations because they do not like the result, would render the parties' agreement to arbitrate meaningless. Appropriately considering the evidence before, the circuit court properly confirmed the Arbitrator's Award. For these reasons, the Court should affirm the circuit court's confirmation of the Arbitrator's Award which orders Appellants to buy Maisano's membership interest in the Company for a value of $189,000.00.

Respectfully submitted,

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