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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Diane Schafer 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.

REPLY BRIEF OF APPELLANT

Bryan P. Kelley (SC Bar No. 76062)
H. Drennan Quattlebaum (SC Bar No. 106418)
Katherine Sieber Elmore (SC Bar No. 102826)
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
kelmore@elmoregoldsmith.com

Counsel for Appellant

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IN REPLY

Despite the sizeable pages of briefing, at issue in this matter is the simple question as to whether a trial court must confirm an arbitration award pursuant to the South Carolina Uniform Arbitration Act in the absence of a motion to vacate, modify, or correct an award. Respondent's Brief attempts to persuade this Court to find that appellate jurisdiction is lacking or in the alternative, that this court should nevertheless affirm based upon issues of "hypertechnical" applications of procedural rules. Yet, such arguments have no basis to this appeal.

Instead, all that was before the trial court was a motion to confirm an arbitration award, which, under South Carolina law, is nothing more than a summary proceeding to make what is already a final arbitration award a judgment of the court. The circuit court erred by injecting itself improperly into the arbitration process where it denied confirmation of the arbitration award and thus circumvented the clear mandate set forth in the South Carolina Uniform Arbitration Act and established case law by grating relief that was neither requested nor permitted under the body of law governing arbitration awards in South Carolina. This Court should reverse and rule that the South Carolina Uniform Arbitration Act requires confirmation of Appellant's timely Motion to Confirm the Arbitration Award.

I. This Court has appellate jurisdiction because the trial court's denial of a motion to confirm an arbitration award is immediately appealable.

In its Statement of Argument in its initial brief, Respondent argues that this Court should dismiss the instant appeal because neither an order denying a request to dismiss, nor an order compelling party to arbitration is appealable. (Resp. Br. p. 2). While such orders are generally not immediately appealable, such an order is not what is being appealed in this instant matter. Contrary to the arguments asserted by Respondent, this is an appeal from an order denying confirmation of an arbitration award – the only issue that was properly before the circuit court.

(*See* App. Br.); s*ee also* (R. pp. 55-92). Under the doctrine of *functus officio*, the deed is done. The arbitrator fully exercised his authority to adjudicate the issue submitted to him, his authority has ended with the Arbitration Award concluding the arbitration proceedings in their entirety, absent agreement by the parties to redetermine those issues. Yet, the circuit court strayed from its limited role in this process by not confirming that award.

Therefore, appellate jurisdiction is not subject to debate. *See* S.C. Code Ann. §§ 15-48-120; 15-48-130; and 15-48-200(3) and (5). "Appeal may be taken, as provided by law, from any final judgment or appealable order or decision…" Rule 201, SCACR. "Orders affecting arbitration proceedings are subject to interlocutory appeal." 2 S.C. Jur. *Arbitration* § 9. An appeal may be taken from an order denying confirmation of an arbitration award. S.C. Code Ann. § 15-48-200(a)(3). Moreover, an order affecting a substantial right is immediately appealable when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken….) S.C. Code Ann. § 14-3-330; *See also e.g., Taylor v. Nelson*, 788 F.2d 220 (4th Cir. 1986) (permitting appeal on similar grounds under the collateral order rule of *Cohen v. Beneficial Industrial Loan Corp.,* 227 U.S. 541 (1949)[1], in holding that the collateral source permits interlocutory appeal of an order if the appealed order conclusively determines the question in the trial court…[or] is effectively unreviewable on appeal from a final judgment….).[2]

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[1] *Taylor*, 788 F.2d at 226 (Appeal from proceeding in which confirmation of arbitration award was sought by one party and vacation of the award was sought by another party would be remanded for entry of order granting motion to confirm, where there was no pending application of a party that could support the vacation, modification, or correction of the award under 9 U.S.C. §§ 9–11 of the Federal Arbitration Act.)

[2] 9 U.S.C. § 16, governing appeals under the FAA, was adopted in 1988 after the *Taylor* decision. To the extent this Court finds Respondent's argument that the order is not appealable because the trial court directed a rehearing as compelling, or that S.C. Code Ann. § 14-3-330 is in applicable, this Court should nevertheless determine that the Federal Arbitration Act preempts such notion, because it does not limit appeal in light of a rehearing. 9 U.S.C. § 16(a)(1)(E) ("An appeal may be taken from an order modifying, correcting or vacating an award.); *c.f.* S.C. Code Ann. § 15-48-

A. An Arbitration "Award" has been issued by the arbitrator.

The Arbitration Award clearly states that, "this [arbitration] proceeding is now concluded." (R. p. 84). Black's Law Dictionary defines an "arbitration award" as "[a] *final decision by an arbitrator* or panel of arbitrators; specif., a written decision by an arbitration tribunal setting forth the *final and binding determination of the merits of a claim, defense, or issue*…" Arbitration Award, *Black's Law Dictionary* (12th ed. 2024) (emphasis added). Black's Law Dictionary further defines an "award" as "*a final judgment or decision*, esp. one by an arbitrator or by a jury assessing damages. – Also termed arbitrament." Award, *Black's Law Dictionary* (12th ed. 2024) (emphasis added). Arbitrament is defined as "1. The power to decide *finally* and *absolutely* for oneself or others. 2. The act of *deciding* or settling *a dispute that has been referred to arbitration*…." Arbitrament, *Black's Law Dictionary* (12th ed. 2024) (emphasis added).

The South Carolina Arbitration Act provides that, "the award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement…" S.C. Code Ann. § 15-48-90(a). Here, the Arbitrator's order was in writing, signed by the arbitrator, and delivered to the parties. That the arbitrator's order concluding the arbitration between Respondent and Appellant is an "Award" cannot be subject to reasonable debate, despite Respondent's attempt to force a limiting reading of the term's operation. "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. In doing so, [courts] must give the words found in a statute their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statue's

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200(a)(5). The underlying arbitration provision is governed by the Federal Arbitration Act. (App. Br. p 8); *see also* (R. p. 2).

operation. Thus if the words are unambiguous, we must apply their literal meaning." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations and quotations omitted).

"An arbitrator's 'award' is a statement of the outcome. The decision of the Arbitrator determining the disputed matters submitted to them is the award." 4 AM. JUR. 2D, *Alternative Dispute Resolution* § 172. Respondent's argument rests on the premise that no arbitration award exists without a monetary component or some affirmative relief. This suggests that any arbitrator's dismissal of claims determined to be baseless does not constitute an award, and that by extension, the arbitrator does not have the power to adjudicate claims by dismissing them. Simply put, Respondent's position is not based on logic or well-settled jurisprudence.

The Arbitration Award at issue in this appeal was a decision, made and entered by the arbitrator that finally and absolutely decided the dispute between Appellant and Respondent that was submitted to it. That is to say, it ended either party's pursuit of claims against the other, whether in arbitration or elsewhere. In fact, the American Arbitration Association Rules clearly provide that "[u]pon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case." Rule R-34, Construction Industry Arbitration Rules of the American Arbitration Association. "The arbitrator may take whatever interim measures he or she deems necessary…. Such interim measures may be taken in the form of an interim award…." Rule R-38, Construction Industry Arbitration Rules of the American Arbitration Association. "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable…. In addition to the final award, the arbitrator may make other decisions, including, interim, interlocutory, or partial rulings, orders, and awards…." Rule R-49, Construction Industry Arbitration Rules of the American Arbitration Association. The power to award a remedy—

including dismissal—is part and parcel of the arbitration process, and an arbitrator has broad authority to fashion a remedy. 4 AM. JUR. 2D, *Alternative Dispute Resolution* § 179. Undoubtedly, dismissal of the arbitration proceedings is a remedy or relief which the arbitrator was permitted to issue. The Circuit Court's denial of Appellant's Motion to Confirm this award is immediately appealable.

Analogous to this authority is Rule 54 of the South Carolina Rules of Civil Procedure, which defines "judgment" as "any decree or order which dismisses the action as to any party or finally determines the rights of any party…" Rule 54, SCRCP. Likewise, Black's Law Dictionary defines "judgment" as "[a] court or other tribunal's *final determination of the rights and obligations of the parties in a case*; also, the act or action of making such a determination." Judgment, *Black's Law Dictionary* (12th ed. 2024) (emphasis added). Just as any judicial order dismissing a cause or causes of action, whether made under Rule 12 or Rule 55 or otherwise, is considered a "judgment," logic can only infer that an arbitrator's order dismissing causes of action or, as is the case in the present dispute, concluding arbitration proceedings in its entirety is a "judgment." "An arbitrator's judgment has the same effect as a judgment of a court of last resort." 4 AM. JUR. 2D, *Alternative Dispute Resolution* § 195.

Here, the award is certain, explicit, and definite. To agree with Respondent's cursory conclusion that no "award" exists would flout the entire purpose of arbitration by sending parties back and forth on a never-ending adventure between arbitral and judicial tribunals at the whim of the losing party. To allow Respondent's argument to prevail would be to grant it a second bite at the apple. Certainly, such notion cannot withstand an inquiry into reason.

Whether one views Appellant's Motion in light in which Appellant plainly stated it or through Respondent's convoluted looking glass, the fact remains that the relief Appellant sought

was relief by confirmation of an Arbitration "Award." Given the arbitrator's Order dismissing the arbitration, Appellant's Motion for confirmation of that award and dismissal of the underlying state court action was appropriate. Crucial to Appellant filing its Motion to Confirm and Dismiss the judicial action, was the fact that a final award had been issued by the arbitrator which concluded the arbitration proceedings. There remained no justiciable issues nor any arbitrable issues between Appellant and Respondent after the Arbitrator issued its final Order.

Respondent now raises issue to the substance of the relief requested in Appellant's Motion to Confirm and asks this Court to ignore the caption of the motion as one to "Confirm an Arbitration Order." (*See* Resp. Br. pp. 6-9). Respondent's argument rests on the premise that, had the trial court ruled differently, its claims against Appellant would indeed have been dismissed. But the fact that such a result is shared by a successful motion to dismiss does not make the two one and the same. Appellant's Motion to Confirm is rather an application to the Trial Court to issue a specific ruling or order. It is clear from the record that Appellant requested confirmation of the Arbitration Award and Respondent was well aware that was the relief sought by Appellant from the Trial Court. (R. pp. 55-91, 106-140).

In Appellant's Motion to Confirm, Appellant asked the Trial Court "for an Order confirming the order of the Arbitrator issued in the underlying arbitration in this matter, and dismissing all claims asserted in this lawsuit WITH PREJUDICE." (R. p. 55). The Trial Court's January 10, 2024, Order denying confirmation acknowledges Appellant's Motion was a motion to confirm an arbitration Award:

> THIS MATTER comes before the Court on the Motion of Defendant Clark Construction, Inc. of Mississippi ("Clark") for an Order: (1) confirming an arbitration order of dismissal; and (2) dismissing this action with prejudice. The Court hereby denies the Defendant's Motion for the reasons set forth herein and orders the parties back to arbitration to resolve AJP's claims against Clark.

(R. p. 7).

To further cement the fact that this was a motion to Confirm, in the Trial Court's April 1, 2024, Order Denying Clark's Motion to Reconsider, the Trial Court stated:

> This matter came before the Court on the motion of Defendant Clark Construction, Inc. of Mississippi ("Clark") to confirm the arbitration order issued in this matter and dismissing this action with prejudice.
> ….
>
> The primary issue before the Court on November 27, 2023, was whether the arbitration order should be confirmed given the circumstances as described. Upon review of the materials filed by the parties and the arguments presented by counsel, the Court denied Defendant Clark's motion to confirm the arbitration order and ordered the parties back to arbitration to resolve the claims asserted.

(R. pp. 14, 15).

In fact, the transcript of the November 27, 2023, hearing confirms that the motion before the Trial Court was a Motion to Confirm the Arbitration Award:

> MR. KELLEY: Good afternoon, Your Honor. I'm Bryan Kelley. I represent the defendants.
>
> It is my motion to confirm an arbitration order -- orders, to be more accurate.
>
> ….

(R. p. 108, lines 7-10).

> [MR. KELLEY:] And so, I guess, to summarize our position, it is that the arguments that Mr. Cantwell is making before the Court today have been considered by the arbitrator. There is no indication that there was any manifest disregard when the arbitrator rejected those arguments. Mr. Cantwell has filed a motion within the arbitration to reconsider, which the arbitrator also denied. The last point I'll make, Your Honor, is that we're asking the Court in confirming the arbitration reward [sic], which ended the arbitration based on the settlement, that the -- the claims against the owners and the discharge bond surety should be dismissed, in addition to the claims brought against Clark, because the only liability that the owner or the discharge bond surety would have would be derivative of any liability that Clark would have to AJP.
> ….

(R. p. 117, line 18-p.118, line 10).

> [MR. CANTWELL:] Now, even if Arch were able to have some sort of interest in whatever arbitration award was settled at the end of the arbitration, that's just a lien or security interest. There was no assignment of an entire claim. And so, Your Honor, because of this, and the reasons that we've cited in our brief, we are asking the Court to deny the defendants' motion to confirm the order of the court [sic], and ask the Court to deem the settlement agreement unenforceable, and send the case back to arbitration so that the parties can decide the facts on the merits and not by some bad faith action of an insurance company jumping in to save its own neck and putting its insured out to lose everything.
> ….

(R. p. 126, line 13-p.127, line 2).

> [MR. KELLEY] All we're asking the Court to do is to confirm that award, and Mr. Cantwell is asking you to determine whether or not the entry of that order is a manifest disregard of the law. We certainly, obviously, contend that it is not. But everything else that we're talking about today is really between AJP and Arch. And they have -- they have a court case where they can fight that out. We don't take a position as to whether or not AJP has a claim against Arch or a defense against AJP. We are simply asking the Court to look at the arbitrator's order, look at the settlement agreement where the claims were released, and confirm it and dismiss the case.
> ….

(R. p. 135, lines 4-17).

Because an award had been issued by the arbitrator, the Trial Court's Order denying confirmation is immediately appealable, despite the fact that the Trial Court ordered the parties back to arbitration. A determination that a party has released its claims is a decision on the merits. The merits have been resolved. There is nothing further to be done. Just because Respondent disagrees with the legal effect of the Arbitration Award, does not make such award lack finality. *See* 6 C.J.S. *Arbitration* § 162 (discussing arbitration awards as final where it conclusively determined the matters submitted to the arbitrator, leaving nothing left to be done but execute and carry out the award's terms).

Respondent's position that appellate jurisdiction is lacking would allow any and every trial court in this State to circumvent the procedural law governing arbitration awards by simply

compelling the parties back to arbitration where the court did not agree with the arbitration outcome. It is not the court's duty to agree or disagree with the arbitration outcome. *Raymond James Financial Services, Inc. v. Bishop*, 596 F.3d 183, 191 (4th Cir. 2010) ("courts must approach remand to the arbitrator with care lest the arbitrator believe that a 'remand' is equivalent to 'retrial' with an expectation of an opposite result the second time around.") Here, the trial court was asked to perform a—ministerial duty—only, in which it had no discretion whatsoever to take any course other than to confirm the arbitration award.

B. The Circuit Court cannot impose its own remedy after reviewing an arbitration award for purposes of confirmation.

Second, the trial court cannot compel arbitration twice because arbitration had already been completed. The reviewing court can vacate and remand only upon certain statutory procedural grounds, or upon the extra-statutory "manifest disregard" standard. This goes to the very principle of the parties' agreement to arbitrate; that disputes are taken out of the court system and resolved by arbitration.

The United States Supreme Court has repeatedly held that the reviewing court (i.e., the trial court) does not have authority to resolve the dispute. *See e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 510-11 (2001) (holding that the court is not permitted to make its own factual findings and legal interpretations). This is exactly the effect of the trial court's order. The trial court substituted its own judgment for that of the arbitrator's by affording its own remedy to the issue of confirmation and thereby frustrating the entire purpose of arbitration. The sole question for the trial court was whether the arbitrator (even arguably) interpreted the parties' contract, not whether the arbitrator got its meaning right or wrong. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).

Here, Appellant appeals the Trial Court's Order because it grossly exceeded its statutory authority, not because it denied an ordinary motion to dismiss. This Court is not divested of appellate jurisdiction even though the Trial Court directed the parties to participate in further arbitration, because Respondent raised no motion to vacate, modify or confirm the Arbitration Award. There is a limit upon which a court can impose its severely limited judicial review of an arbitration award upon these grounds as the law sets forth certain requirements before a court can review an Award. *See* S.C. Code Ann. §§ 15-48-120, 15-48-130, and 15-48-140.

The South Carolina Supreme Court has expressly prohibited a Trial Court from vacating an award, even when the arbitrator potentially decided issues that were not subject to arbitration, because the aggrieved party failed to file a motion to vacate or modify within 90 days, stating:

> S.C. Code Ann. Sections 15–48–130 (Supp.1984) and 15–48–140 (Supp.1984) provide the exclusive procedures for vacating or modifying awards where arbitrators exceed their powers or award upon a matter not properly submitted to them. [Appellant] filed no motion to vacate or modify within 90 days of delivery of a copy of the award. Consequently, the award became the law of the case.

Sentry Engineering and Const., Inc. v. Mariner's Cay Development Corp., 287 S.C. 346, 350–51, 338 S.E.2d 631, 634 (1985).

Therefore, the Trial Court had no authority to direct rehearing because the Award became the law of the case. "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." S.C. Code Ann. § 15-48-130. As such, this Court is not divested in appellate jurisdiction.

Furthermore, Respondent attempts to conflate the direction for rehearing as a Court Order to compel arbitration. In fact, Judge McFaddin has previously compelled arbitration, in concluding in his June 22, 2023, Order that the subject matter of this dispute was subject to binding and mandatory arbitration. (R. pp. 1-4). The resulting award is the law of the case, and the Trial Court's

refusal to recognize it is immediately appealable. As discussed in the following sections, the issues in which Respondent objected to confirmation of the Arbitration Award were properly before the arbitrator and not the judiciary, despite Respondent's attempts to relitigate the merits.

Notwithstanding S.C. Code Ann. § 15-48-200(a)(3) allowing for direct appeal of an order denying confirmation of an arbitration award, the Trial Court's Order denying Confirmation is directly appealable because it also deprives Appellant of a statutory right. Specifically, the Trial Court's refusal to apply the South Carolina Uniform Arbitration Act deprived Appellant of its procedural right to have the Arbitration Award become official record. *See* S.C. Code Ann. § 14-3-330(2) (interlocutory order is appealable if it is "an order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken…") Instead, the Trial Court exceeded its limited statutory authority by entertaining and ultimately ruling upon an untimely argument raised by Respondent.

All that was at issue before the Trial Court was the mere conclusion of the arbitration proceeding as contemplated by the Arbitration Act. The Arbitration Act bars Respondent's attempt to relitigate issues conclusively decided at arbitration by questioning the arbitration proceedings before a judicial tribunal without following the statutory mandates set forth in S.C. Code Ann. § 15-48-130, such that the Trial Court's Order directing the parties back to arbitration divests this Court of appellate jurisdiction.

C. Appellant acknowledges that an "award" is distinguishable from a "settlement."

To address Respondent's point that an "award" is distinguishable from a "settlement," (Resp. Br. p. 8) Appellant does not dispute this notion. Appellant is not attempting to enforce a settlement. Instead, Appellant asked the trial court to confirm the Arbitration Award.

Here, Respondent is attempting to conflate the Settlement Agreement and the Order dismissing the arbitration proceedings issued by the arbitrator as one in the same. Respondent cites *Henderson v. Summerville Ford-Mercury, Inc.*, to argue that an arbitration award is distinguishable from a settlement. 405 S.C. 440, 451 n. 5, 748 S.E.2d 221, 227 n. 5 (2013). Conveniently, Respondent overlooks certain language in *Henderson* adverse to its position.

In *Henderso*n, the Dealer argued that dismissal and vacatur of the underlying trial court case after arbitration concluded was appropriate because the Dealer had already paid the judgment set forth in the arbitration award. However, like Respondent, "Dealer omits the language we emphasize from the treatise [it cited], which indicates confirmation can serve multiple purposes." *Id.* at 452, 748 S.E.2d at 227 (quoting 6 C.J.S. *Arbitration* § 178 (2004)) ("[T]he proceeding ordinarily is not initiated unless one of the parties refuses to abide by the award or unless it be the desire of a party that an official record of the confirmation and judgment be made."). "Confirmation is a ministerial act of recording the results of the arbitration." *Id.* at 454, 748 S.E.2d at 228. "[O]nce arbitration is completed, a court has no jurisdiction except to confirm and enter judgment or to vacate, modify, correct, or enforce the judgment." *Id*. at 453 n.7, 748 S.E.2d at 228 n.7. "Confirmation is appropriate because by law a court must confirm an award upon application of a party unless the defendant moves to vacate, modify, or correct the award." *Id.* at 451, 748 S.E.2d at 227. "Confirmation is not a separate judicial process; it is merely a continuation of the arbitration procedure." *Id*. at 452, 748 S.E.2d at 227. Thus, *Henderson* holds that the trial court's role upon a motion to confirm an arbitration award is a statutory and ministerial act; thus, the trial court cannot inquire into the propriety of that award except on separate motion (which Respondent did not make).

II. Respondent misconstrues the application of the two-issue rule because, should the Court find in favor of Appellant, the result of the trial court's rulings would change.

The two-issue rule has no application to this appeal because this is an appeal from an order denying confirmation of an arbitration award. Review by the trial court of an arbitration award is so limited in nature. In this instance, review was limited to the furthest extent known in our legal system. "[A] statute's use of the word 'shall' 'creates an obligation impervious to judicial discretion." *Smith v. Spizzirri*, 601 U.S. 472, 472 (2024) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)) (discussing 9 U.S.C. § 3).

"Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)). The two-issue rule resolves an appeal because "it would be pointless to consider exceptions which do not reach [the] dispositive finding." *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160, 177 S.E.2d 544 (1970). Respondent argues that the order of the trial court denying confirmation of the arbitration award was based on two grounds and Appellant appealed only one, and the appeal therefore fails because Appellant did not appeal the Court's ruling regarding Rule 43(k), SCRCP. This argument is without merit.

Simply put, Appellant challenges the authority of the Trial Court to reach any finding other than confirmation of the arbitration award. *Any* other action by the Trial Court was made without statutory or legal authority and constitutes reversable error. The actions taken by the Trial Court here include the Trial Court's determinations related to either the enforceability of the settlement agreement or the arbitrator's authority. In other words, the Trial Court's overstep is a threshold issue rendering moot all of the rulings within the Trial Court's order.

Appellant respectfully requests that this Court decline Respondent's request to accommodate its "overzealous application of appellate preservation rules" or to "play a 'gotcha' game with attorneys…." *Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 332-33, 730 S.E.2d at 287 (Toal, C.J., concurring in result and dissenting in part) (discussing two-issue rule) ("[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice"); *Id.* at 329, 730 S.E.2d at 285 (majority "share[s] Chief Justice Toal's] concerns about a hypertechnical application of a procedural bar to appellate arguments").

To highlight the fallacy in Respondent's positions, on one hand it argues this Trial Court denied a motion to dismiss. On the other hand, it argues that any such ancillary statement within that order is now the law of the case. However, the denial of a motion to dismiss cannot establish the law of the case and issues raised by the motion can be raised again at a later stage in the proceedings. *McLendon v. South Carolina Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994).

III. The issues on this appeal are preserved for appellate review.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide this Court with a meaningful appellate review. "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (citing Jean Hoefer Toal, et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). Appellant has satisfied these four basic requirements.

A. Timeliness of objection.

In its brief, Respondent claims that it defies logic that it was required to timely object to the arbitration award when such "award" was not even an award but rather an arbitration "order." As discussed in *Infra* Part I, this "order" concluded arbitration. It is in fact not only highly logical that Respondent was required to timely move to vacate, but the only avenue for Respondent to contest the arbitration award. Appellant filed its Motion to Confirm, well within the 90-day period running in which Respondent could file a motion to vacate, modify, or correct the award. What else is left to do other than sit in a state of never-ending purgatory?

Respondent argues that Appellant's argument regarding the timeliness of Respondent's objection to the arbitrator's [award] is not preserved. This argument is misplaced because Appellant does not have issue with "objection" but rather with Respondent's failure to raise a timely motion to vacate, modify or correct the arbitration award and the trial court's ruling that does not comport with the Uniform Arbitration Act.

Specifically, the only issue before the trial court during the November 27, 2023, hearing was whether the trial court should confirm the arbitration award. The trial court could have done one of two things and nothing more: (1) confirm the award; or (2) decline to confirm the award. Respondent, as a party to the underlying action certainly could have raised objection to the trial court. In fact, it did. However, the trial court could only do one of two things, confirm or decline to confirm, absent a timely motion by Respondent to vacate, modify, or correct. Respondent never filed any motion. Logically, the Court cannot vacate an award or compel the parties back to arbitration a second time when such ruling is not permitted under the South Carolina Uniform Arbitration Act. *See e.g.*, *Eatman's, Inc. v. Martin Engineering, Inc.*, 311 S.C. 282, 284, 428 S.E.2d 736, 737 (Ct. App. 1993) (ninety day period under Section 15-48-140 is absolute) (quoting

Taylor, 788 F.2d 220 (4th Cir. 1986) ("once the three-month period has expired, an attempt to vacate an arbitration award could not be made even in opposition to a later motion to confirm.")).

Therefore, it follows that Appellant could not have known that the circuit court would do anything other than confirm or deny confirmation of the award. Either of which is immediately appealable. S.C. Code Ann. § 15-48-200(a)(3).

B. Preservation of Issues through Rule 59, SCRCP.

The Trial Court's January 10th Order was one in which it denied confirmation of an award, while at the same time granted relief to Respondent that was neither asked for nor allowed under the South Carolina Uniform Arbitration Act in sending this matter back to arbitration. *See* S.C. Code Ann. § 15-48-120 ("Upon 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, in which case the court shall procced as provided in Sections 15-48-130 and 15-48-140"). The only prescribed exception which allows a court to direct a rehearing before the arbitrator who made the award is through vacation. Yet, in order for a trial court to consider vacating an Award, the party opposing confirmation is required to raise a motion to vacate "within ninety days of delivery of a copy of the award." *See* S.C. Code Ann. § 15-48-130(b) and (c). Because the Arbitration Award had been issued, the Trial Court could only have ordered a rehearing upon the motion of Respondent to vacate the arbitration order. Respondent never filed such a motion. Thus, a Rule 59(e) motion was necessary to show the court the law it misapplied.

A post-trial motion *must* be made when the trial court grants relief not requested or rules on an issue that was never raised at trial. *See e.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*. 311 S.C. 56, 427 S.E.2d 673 (1993). The issue raised was one of confirmation of an arbitration award. Here, the trial court failed to confirm the award and ordered relief not

authorized by law. Appellant could not have raised such issues to the trial court before or during the hearing as Respondent never filed a motion to vacate, modify or correct in accordance with the procedure outlined in the South Carolina Uniform Arbitration Act. Therefore, raising such issues in Appellant's Rule 59(e), SCRCP, motion was appropriate to present to the Court its error in applying the law and granting of relief that was not permitted.

C. Respondent – and not Appellant – invoked the Arch Settlement Agreement as a basis for denying Appellant's Motion to Confirm.

Respondent contends that "Appellant specifically invited the Circuit Court to do precisely what Appellant now claims to be improper," that "Appellant invited the Circuit Court to consider the validity of the Settlement Agreement," (Rep. Br. p. 11) and that such an invitation constituted a waiver of Appellant's ability to challenge the Circuit Court's failure to comply with its statutory mandate to confirm the award.

We note, however, that Respondent raised the settlement agreement between Appellant and Arch Insurance Company ("Arch") as a basis to deny Appellant's Motion to Confirm in Appellant's Response to Confirm Arbitration Order / Motion to Dismiss. (R. pp. 179-184). In its Response, Appellant regurgitated the very same arguments previously rejected by the arbitrator (i.e., that Arch was not a party to the arbitration, that Arch waived Respondent's claims against Appellant by way of the settlement agreement without authorization; that Arch acted in bad faith; that Arch failed to notify Respondent of any breach of Arch's bond; and that Arch lacked authority under its indemnity agreement with Respondent to settle its claims against Appellant).

At the hearing on Appellant's Motion to Confirm, Appellant's counsel addressed the merits of Respondent's arguments. Respondent contends that, by doing so, the Circuit Court was invited by Appellant to exceed the limits of its authority and disregard its ministerial duty imposed by S.C. Code Ann. § 15-48-120. In support of this contention, Respondent cites *Hillman v. Pinion*, 347

S.C. 253, 257, 554 S.E.2d 427, 430 (Ct. App. 2001), stating an appellant "will not be heard to complain on appeal of an error he voluntarily committed before the trial court."

In *Hillman*, the Court of Appeals affirmed a trial court's denial of a motion for relief from judgment under Rule 60, SCRCP, on the basis that dismissal the appellant sought to set aside resulted from his own motion to dismiss. *Hillman* does *not* stand for the proposition that a substantive discussion regarding the merits of arguments initially raised by an opposing party somehow excuses the trial court's obligation to act within its authority.

IV. This Court should refrain from deciding unnecessary questions raised by Respondent as additional sustaining grounds.

"It is within the appellate court's discretion whether to address any additional sustaining grounds." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). While, "the respondent may raise an additional sustaining ground that was not even presented to the lower court, [ ] the appellate court is likely to ignore it." *Id.* at 422, 526 S.E.2d at 724.

Here, Respondents' remaining arguments for sustainment seek to convolute the issues before this Court in an effort to litigate issues between itself and its surety, Arch. We reiterate that the sole issue before the Trial Court – in the absence of a Motion to Vacate by the Respondent – was to conduct the ministerial duty of confirmation of the arbitrator's award. Respondent had already endeavored and failed to convince the arbitrator to disregard the settlement agreement between Arch and Appellant by contending Arch lacked authority to release Respondent's claims against Appellant. Had Respondent believed the arbitrator manifestly disregarded the law in refusing to give credence to Respondent's arguments, it could and should have sought to vacate the arbitrator's award.

That ship has now sailed. Should Respondent believe Arch exceeded its authority in releasing its claims against Arch, such claims should be pursued against Arch.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that the ruling of the Trial Court be Reversed.

Respectfully submitted,

/s/*Bryan P. Kelley*
Bryan P. Kelley (S.C. Bar No. 76062)
H. Drennan Quattlebaum (S.C. Bar No. 106418)
Katharine Sieber Elmore (S.C. Bar No. 102826)
Elmore Goldsmith Kelley & deHoll, P.A.
19 Blair Street (29607)
Post Office Box 1887
Greenville, South Carolina 29602
Telephone: (864) 225- 9500
Facsimile: (864) 255-9505
bkelley@elmoregoldsmith.com
dquattlebaum@elmoregoldsmith.com
kelmore@elmoregoldsmith.com

Counsel for Appellant

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Greenville, South Carolina