RECEIVED
Nov 06 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Thomas W. McGee III, Circuit Court Judge

Case No. 2021-cp-10-01215
Appellant Case No. 2024-001813

Mansfield at Park West, Inc. ……………………………………… Respondent,

v.

D.R. Horton, Inc. ………………………………….…………… Appellant.

FINAL BRIEF OF APPELLANT D.R. HORTON, INC.

Table of Contents

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL........ 1

STATEMENT OF THE CASE........ 1

STANDARD OF REVIEW 3

SUMMARY OF FACTS 4

ARGUMENTS........ 9

I. THE ARBITRATOR AND CIRCUIT COURT SUBVERTED DECISIONAL LAW OF THE UNITED STATES SUPREME COURT AND THE CONTROLLING DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS BY VALIDATING THE RESPONDENT'S IMPROPER AMENDMENT OF THAT DECLARATION (A) TO CLAIM STANDING AND REAL-PARTY-IN-INTEREST STATUS AND (B) TO ELIMINATE THE AGREED PROCEDURE FOR HANDLING CLAIMS. 9

II. THE CIRCUIT COURT ERRED BY NOT VACATING THE AWARD OF THE ARBITRATOR, WHO VIOLATED THE PARTIES' AGREEMENT FOR A REASONED AWARD, WHICH THE APPELLANT REQUESTED IN ORDER TO ASSURE CORRECT ANALYSIS OF THE FACTS AND LAW BY THE ARBITRATOR........ 21

III. THE CIRCUIT COURT ERRED BY NOT VACATING THE AWARD OF THE ARBITRATOR FOR HIS FAILURE AND REFUSAL TO ALLOCATE HIS AWARD AMONG THE APPELLANT'S REQUESTED CONSTRUCTION CATEGORIES, THEREBY IGNORING THE PARTIES' AGREEMENT FOR A REASONED AWARD AND DEPRIVING THE APPELLANT OF ITS RIGHT TO CONTRIBUTION AND INDEMNIFICATION FROM ITS RESPECTIVE CONTRACTORS AND SUBCONTRACTORS THAT CAUSED THE AWARDED DAMAGES. 31

CONCLUSION........ 34

TABLE OF AUTHORITIES

Cases

Bank of Am. , N.A. v. Draper, 405 S.C. 214, 746 S.E.2d 478 (Ct. App. 2013) ---------- 17
Bardoon Properties v. Eldolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997) ---------- 17, 20
Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012) ---------- 10
C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013) ---------- 3, 12, 13
D.R. Horton, Inc. v. Builders FirstSource – Se Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (S.C. App. 2018) ---------- 32
Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022) ---------- 10, 11
Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) ---------- 6, 10, 15
Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 239 S.E.2d 647 (1977) ---------- 11
Gas Aggregation Serv., Inc. v. Howard Avista Energy, LLC, 319 F.3d 1060 (8th Cir 2003) ---------- 24
Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) ---------- 3, 4, 11, 12
Hawkins v. Hammond, 437 S.C. 36, 875 S.E. 2d 60 (Ct. App. 2022) ---------- 17
Hoffman v. Cargill Inc., 236 F.3d 458 (8th Cir 2001) ---------- 24
Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000) ---------- 23, 29
Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705 (1993) ---------- 18
Lamps Plus. Inc. v. Varela, 139 S. Ct. 1407 (2019) ---------- 6, 10, 15, 20
Leeward Const. Co., Ltd. V. Am. Univ. of Antigua-College of Medicine, 826 F.3d 634 (2nd Cir. 2016) ---------- 23, 28, 33
Missouri River Servs., Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848 ((8th Cir 2001 ---------- 24
Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997) ---------- 12
N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100, 256 F.3d 89 (2nd Cir. 2001) ---------- 12
Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 488 S.E.2d 335 (1997) ---------- 22
Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001) ---------- 14
Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E. 2d 474 (2006) ---------- 17
Spear, Leeds & Kellogg v. Bullseye Sec., Inc., 291 A.D.2d 255, 738 N.Y.S.2d 27 (N.Y. App. Div. 2002) ---------- 13
Stage Stores, Inc v. Gunnerson, 477 S.W.3d 848 (Tex. App. 2015) ---------- 23, 28, 33
Trailmobile Trailer, LLC v. Int'l Union of Electronic, Electrical, Salaried, Mach. & Furniture Workers, AFL-CIO, 223 F.3d 744 (8th Cir 2000) ---------- 24
Trident Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) ---------- 3, 12
Vold v. Broin & Assocs. 2005 S.D. 80, 699 N.W.2d 482 (S.D. 2005) ---------- 23, 24
Waldo v. Cousins, 442 S.C. 662, 901 S.E.2d 276, 279 (2024) ---------- 27, 28
Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) ---------- 3, 12
Wichinsky v. Mosa, 109 Nev. 84, 847 P.2d 727 (Nev. 1993) ---------- 13

Statutes

Federal Arbitration Act (FAA). 9 USC § 10 (2002) ---------- 24
Federal Arbitration Act, 9 U.S.C. §§ 1-16 ---------- 10, 11, 35
Federal Arbitration Act, 9 U.S.C. Section 10 ---------- 24
Federal Arbitration Act, 9 U.S.C. Section 10(a) (4) ---------- 24

Rules

Rule 1, SC ADR Rules ---------- 25
Rule 17(a), SCRCP ---------- 17
Rule 21 (b), SC ADR Rules ---------- 25
Rule 56(c), SCRCP ---------- 13, 14
SC ADR Rules ---------- 25
South Carolina Code of Ethics for Arbitrators, Canon I (F) ---------- 25, 34, 35, 36

STATEMENT OF ISSUES ON APPEAL

1. The arbitrator and circuit court subverted decisional law of the United States Supreme Court and the controlling Declaration of Covenants, Conditions and Restrictions by validating the Respondent's improper amendment of that Declaration (a) to claim standing and real-party-in-interest status and (b) to eliminate the agreed procedure for handling claims.
2. The circuit court erred by not vacating the award of the arbitrator, who violated the parties' agreement for a reasoned award, which the Appellant requested in order to assure correct analysis of the facts and law by the arbitrator.
3. The circuit court erred by not vacating the award of the arbitrator for his failure and refusal to allocate his award among the Appellant's requested construction categories, thereby ignoring the parties' agreement for a reasoned award and depriving the Appellant of its right to contribution and indemnification from its respective contractors and subcontractors that caused the awarded damages.

STATEMENT OF THE CASE

Respondent is the Homeowner's Association ("HOA") for The Mansfield at Park West, a 28-townhome community of new townhomes that D.R. Horton, Inc. developed in 2009-2010. After the Statutes of Limitations and Repose had expired, the HOA filed a Complaint on March 12, 2021 naming D.R. Horton, Inc. as the Defendant. (ROA pp. 27-36) The complaint alleged construction defects in individual townhome units. The HOA claimed itself as the Plaintiff by virtue of having recorded on March 9, 2021, just three days prior to filing the lawsuit, its amendment to the Declaration of Covenants, Conditions, and Restrictions for Mansfield at Park

West ("CCRs") purporting to give the right to pursue in arbitration class action construction claims to itself as a single plaintiff. (ROA pp. 28, para. 1; 208-210) The HOA also filed a motion to compel arbitration on March 12, 2021. (ROA pp. 37-38)

D.R. Horton filed an Answer, Jury Trial Demanded, and a Motion to Dismiss on May 18, 2021. (ROA pp. 39-47)

The parties entered into a Consent Order to Arbitrate on July 28, 2021, preserving D.R. Horton's Motion to Dismiss to be heard at arbitration. The Consent Order selected South Carolina law as the controlling law for the selection of the arbitrator in paragraph two. (ROA pp. 1-3)

D.R. Horton filed an Amended Answer on June 10, 2022. (ROA pp. 77-96)

D.R. Horton filed a Motion for Summary Judgment and a Memo in Support of its Motion for Summary Judgment on August 30, 2022 followed by a Reply Brief in Support of its Motion for Summary Judgment on September 22, 2022 in which it sought summary judgment as to the standing and real party in interest issues raised by the amendments to the CCRs that it asserts contractually violated the CCRs. (ROA pp. 97-101; 102-210; 211-264)

D.R. Horton filed a Prehearing Brief July 2023. (ROA pp. 558-631)

The arbitration hearing was held on July 26 and 31, 2023 before arbitrator Thomas J. Wills, IV, who issued his award on August 22, 2023. (ROA pp. 18-22) D.R. Horton filed a motion for clarification regarding the damages award, requesting an allocation of the damages, which the arbitrator summarily denied. (ROA pp. 657-659; 23-27)

D.R. Horton filed a Motion to Vacate the Arbitration Award on November 20, 2023. (ROA pp. 265-996) The court held a hearing on July 12, 2024 and denied the motion on September 4, 2024. (ROA pp. 5-14)

D.R. Horton filed a Motion for Reconsideration on September 16, 2024, which was denied on October 3, 2024. (ROA pp. 1045-1056; 15-17) D.R. Horton filed a Notice of Appeal on October 24, 2024. (ROA pp. 1057-1081)

STANDARD OF REVIEW

The Federal Arbitration Act provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. Section 10. Applicable to this case is (4) which provides for an award to be vacated where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. Section 10(a)(4). The South Carolina arbitration statute also requires an arbitrator's award to be vacated when the arbitrator exceeds his powers. S.C. Code Section 15-48-130 (2016). Additionally, South Carolina provides for a non-statutory basis to vacate an award: manifest disregard or perverse misconstruction of the law, which occurs when an arbitrator "knew of a governing principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241-42, 676 S.E.2d 320, 323-24 (2009).

While "[a]rbitration is a favored method of settling disputes in South Carolina," *Gissel v. Hart,* 382 S.C. 235, 241, 676 S.E. 2d 320, 323 (2009), "[a]n arbitration award may be vacated when the arbitrator exceeds his or her powers or manifestly disregards or perversely misconstrues the law. *Id. See also Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). This basis "for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart,* 382 S.C. 235, 241-42, 676 S.E. 2d 320, 323-24 (2009); *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs,* 286 S.C. 98, 333 S.E.2d 781 (1985). In circumstances where the court is asked to vacate an arbitration award for "manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly

applicable." *Gissel at.* at 323-24, 676 S.E.2d at 241-42. "Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. *Id.* at 324; 676 S.E.2d 242. An arbitrator gains his authority from agreement of the parties and an award must be vacated when the arbitrator does not comply. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.,* 232 F.3d 383, 389 (4th Cir. 2000).

SUMMARY OF FACTS

Introduction

This crux of this case is whether an arbitrator may ignore and circumvent United State's Supreme Court decisions that litigants may not be forced to have class action claims decided in arbitration without their specific consent to do so. That is what happened in this case and why this case is important.

The setting is in the context of a construction defect arbitration in which the Respondent HOA and its counsel have attempted to circumvent the clear terms of the Declaration of Covenants, Conditions, and Restrictions for Mansfield at Park West ("CCRs") to purport to give the HOA standing and real party in interest capacity to sue for all of the townhome owners at Mansfield, as a defacto class action in arbitration - a class action arbitration to which Appellant did not consent. The amendments to make these changes violated the CCRs, contrary to clear South Carolina contract law. The HOA, even with the amendments, still had no stake in the case because it had no obligations, responsibilities, or rights regarding any ownership, repairs, or financial obligations to the townhomes or the townhome owners. The HOA is not a real party in interest. The HOA had no standing because

the CCRs amendments were not valid. The amendment to the dispute resolution procedure, imposed upon Appellant only three days after it was recorded, was also invalid and improperly imposed. The result of the arbitrator's award is an end run around the United States Supreme Court prohibition on forced class action arbitrations. And we have no idea why the arbitrator decided to grant an award that runs afoul of United States Supreme Court precedent because he said nothing about his reasons, despite his obligation to provide a reasoned award, which raises the second main concern in this appeal.

The second main concern of this appeal involves the arbitrator's failure and refusal to issue the reasoned award that the arbitrator and parties agreed would be issued. A reasoned award was requested to ensure the arbitrator engaged in an analysis before rendering an award. Engaging in an analysis and putting pen to paper clarifies understanding and leads to correct decisions. A reasoned decision was agreed to but was not provided.

The trial court attempted to cure the lack of reasoning, however, as discussed in this brief, that attempt was flawed and does not remedy the arbitrator's failure to issue the reasoned award. If this is the future of arbitration in South Carolina, then a third concern, is whether arbitration is likely to remain a viable resource for commercial entities.

Facts

Appellant was the developer at the Mansfield at Park West, a townhome development that was completed, and certificates of occupancy issued in calendar years 2009 – 2011, approximately 12-14 years ago.[1] The townhomes were built using materials from interstate commerce and sold as new housing units to the original purchasers. Appellant did not build

[1] Certificates of Occupancy confirm the timeframe. (ROA pp. 118-140).

any townhomes itself. Construction was performed by various contractors and subcontractors.

At some point, townhome owners decided to pursue claims for defective construction. They hired a law firm to put into motion a means to effectively bring a class action in arbitration even though the parties had never agreed to class action arbitration. This violated United States Supreme Court case law. *Lamps Plus. Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcing as written arbitration agreements that preclude class action arbitration). In order to achieve their desire to pursue claims for the entire development in a single arbitration, the townhome owners and the HOA devised a scheme to prematurely and improperly modify CCRs to give the right to pursue the construction claims to the HOA as a single plaintiff and modified the entire dispute resolution process. Appellant objected to this maneuver, filed a motion for summary judgment, and argued that not only did the amendments violate the CCRs, but also that the HOA lacked standing and was not a real party in interest. (ROA pp. 97-264)

The amendments violated the CCRs because the CCRs were filed on September 13, 2007, and with an initial twenty-year term that is effective until September 2027. CCRs, §1.2. (ROA pp. 312; 307-373) Appellant is the Declarant with rights under the CCRs for the full duration of the initial twenty-year term. After, *but only after*, the initial twenty-year period ending on September 30, 2027, the CCRs may be modified by the owners pursuant to §18.1.[2] The CCRs also provide that each townhome owner is solely responsible for his or her own interior and exterior maintenance, including their individual roofs.[3] CCRs, §5.2.

---

[2] Under other scenarios, the Declarant had rights to modify the CCRs under certain circumstances under a separate provision not applicable to this case, §18.2, and used that right once before unrelated to this matter. That Amendment is reflected in the First Amendment to the CCRs. The amendments the townhome owners and the HOA attempt to use in this case constitute the Second Amended CCRs.

[3] Each townhome owner owns his or her property in fee simple.

(ROA pp. 318-19) The Homeowners Association, the homeowners, and D.R. Horton, as the Declarant, are the parties to the CCRs. The homeowners attempted to transfer their rights to this litigation to the Homeowners Association on March 1, 2021, in the Second Amended CCRs, recorded *just three days before filing suit in this case*. (ROA pp. 208-210) However, the governing documents prohibited such an amendment, because the CCRs provide that any amendments to the CCRs *do not take effect and may not be enforced until three years after an amendment is recorded and that the CCRs may be amended only after the initial twenty-year terms pursuant to §18.1*. CCRs, §18.1. (ROA p. 341) The homeowners' association violated that provision when it enacted the amendments giving it the putative right to pursue the defective construction claims, enacted an amendment modifying the dispute resolution provision, and filed the action against D.R. Horton immediately thereafter. (ROA pp. 341; 97-264) D.R. Horton objected to the amendments being made and applied prematurely. Appellant's contractual interests in the amendment process, timing, dispute resolution process, and other terms and conditions of the CCRs remained relevant to Declarant as the developer and were part of its negotiated business deal with the townhome purchasers.

D.R. Horton also argued in its motion for summary judgment, at the arbitration hearing, in its motion to vacate, and in its motion for reconsideration that Respondent is not a real party in interest because it has suffered no damages, no losses, and is under no obligation to provide any money, resources, repairs, or replacements to the townhome owners from the lawsuit. The attempted amendments did not modify §5.2 of the CCRs leaving the homeowners solely obligated to maintain the interior and exterior for each townhome's maintenance. The HOA assumed no obligation to repair any townhome or to provide any

funds to any homeowner for such purpose. The HOA also failed to comply with the dispute resolution process in the First Amended CCRs making the lawsuit premature, as well.

At arbitration, a reasoned award was agreed to, which required the arbitrator to issue a reasoned award. Affidavit of John Crawford. (ROA pp. 1055-1056) A reasoned award was required for each issue in the case – standing, real party in interest, the contract issues raised by the CCRs amendments, construction issues, and damages. No one has stated that a reasoned award was not agreed to. Because it was agreed to, it was a required part of the arbitrator's responsibility. Respondents assert that the award was reasoned. It was not, except as to gross negligence. Appellant was entitled to a full reasoned award, which the arbitrator failed to provide.

The trial court determined that the parties are not entitled to a reasoned award under South Carolina law, even when that is the agreed upon format for the award. Such a perspective ignores all the various arbitration organizations' choices for arbitration awards and frustrates litigants' arbitration choices. Moreover, the trial court pointed to no statute, caselaw, or rule that prohibits reasoned awards under South Carolina law or under the Federal Arbitration Act when that is what the parties and the arbitrator agreed to.

Respondent waited until well past the Statute of Repose to file the lawsuit; therefore, it had to prove gross negligence to overcome the Statute of Repose. The arbitrator agreed that in the 12-14 years since the buildings were completed there had been no interior damage to the townhomes, which is what the siding, roof and windows are required to prevent. The arbitrator said, "I'm not saying it's prematurely failing. I'm not even arguing that because there's very little proof. There's leaks around the windows maybe and there's some problems

with the shingle issue." (Motion to Vacate, Exhibit Y, 7/31/2023 Tr. pp 274 lines 20-24 (ROA p. 982) and p. 279 lines 7-13 (ROA p. 983)) The only way the Respondent could recover, however, was for the arbitrator to find gross negligence. D.R. Horton argued it did not commit gross negligence and while it remains committed to that position, it understands that the Court frowns upon reviewing the purely factual decision of the arbitrator and therefore does not pursue that as part of this appeal except to the extent that a new arbitration before a different arbitrator would include arbitration as to all issues. Gross negligence is the only issue for which the arbitrator provided a reasoned award; but he then failed to complete the damages task when he provided a standard lump sum award – rather than the agreed upon reasoned award – as to the damages that the arbitrator knew would prevent Appellant's ability to seek recompense from its contractors and subcontractors for their work. This resulted in a punitive-type award against Appellant for the entire damage burden, which is not allowed.

The Federal Arbitration Act applies because the building and sale of the townhomes affect interstate commerce as discussed below. To the extent that federal law and South Carolina diverge in this case, federal law preempts South Carolina law, except as to the selection of the arbitrator which specifically references South Carolina law in the Consent Order in paragraph two. (ROA p. 1) In many respects, for this case, the law is substantially the same.

ARGUMENTS

I. THE ARBITRATOR AND CIRCUIT COURT SUBVERTED DECISIONAL LAW OF THE UNITED STATES SUPREME COURT AND THE CONTROLLING DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS BY VALIDATING THE RESPONDENT'S IMPROPER AMENDMENT OF THAT DECLARATION (A) TO CLAIM STANDING AND REAL-PARTY-IN-INTEREST STATUS AND (B) TO ELIMINATE THE AGREED PROCEDURE FOR HANDLING CLAIMS.

a. The Arbitrator Ignored South Carolina Law On Standing, Real Party In Interest, Contract Law, And The Clear Terms Of The CCRs And Manifestly Disregarded The Law When He Failed To Grant Appellant Summary Judgment And Find For Appellant On This Issue In The Arbitration And Dismiss The Case.

The United States Supreme Court decided that parties cannot be forced to arbitrate class claims unless they have specifically agreed to do so. *Lamps Plus. Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcing as written arbitration agreements that preclude class action arbitration). Appellant did not agree to class action arbitration. Respondent attempted to force Appellant to arbitrate class action claims through the second amendment to the CCRs , which purported to give the HOA the authority to pursue construction defect claims for the class of owners at Mansfield. The amendment was a thinly veiled end run around the United States Supreme Court's restrictions on class actions in arbitrations, but it did not provide the HOA with a real party in interest stake in the matter and it did not provide the HOA with standing because the amendment was not valid, as discussed in detail below.

The Federal Arbitration Act (FAA) , 9 U.S.C. §§ 1-16, applies to arbitrations that affect interstate commerce. D. R. Horton is incorporated in Delaware with a principal place of business in Texas. It develops housing projects across the United States using building materials, human resources, and financing in interstate commerce throughout the country. The Mansfield development was one such interstate commerce and resource project. In *Damico v. Lennar Carolinas, LLC*, the South Carolina Supreme Court held that "the transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes. *See, e.g., Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts

have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (explaining that contracts requiring the construction of a new building implicate interstate commerce because it would be "virtually impossible" to construct the building "with materials, equipment[,] and supplies all produced and manufactured solely within the State of South Carolina")" *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022). To the extent that federal law and South Carolina diverge in this case, federal law preempts South Carolina law. In many respects, for this case, the law is substantially the same.[4] *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977)

The FAA provides the statutory grounds for vacating an arbitrator's award. *See* 9 U.S.C. Section 10. Applicable to this case is (4) which provides for an award to be vacated where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. Section 10(a) (4). The South Carolina arbitration statute also requires an arbitrator's award to be vacated when the arbitrator exceeds his powers. S.C. Code Section 15-48-130 (2016). Additionally, South Carolina provides for a non-statutory basis to vacate an award: manifest disregard or perverse misconstruction of the law, which occurs when an arbitrator "knew of a governing principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241-42, 676 S.E.2d 320, 323-24 (2009).

While "[a]rbitration is a favored method of settling disputes in South Carolina," *Gissel v. Hart,* 382 S.C. 235, 241, 676 S.E. 2d 320, 323 (2009), "[a]n arbitration award may be vacated when the arbitrator exceeds his or her powers or manifestly disregards or perversely misconstrues the law. *Id. See also Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct.

[4] The Consent Order to arbitrate, provides that the selection of the arbitrator would be under South Carolina law. (ROA p.1) That Consent Order does not waive any other rights under the FAA.

App. 2005). This basis "for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart,* 382 S.C. 235, 241-42, 676 S.E. 2d 320, 323-24 (2009); *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Trident Technical College v. Lucas and Stubbs,* 286 S.C. 98, 333 S.E.2d 781 (1985). In circumstances where the court is asked to vacate an arbitration award for "manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Gissel at.* at 323-24, 676 S.E.2d at 241-42. "Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers. *Id.* at 324; 676 S.E.2d 242. An arbitrator gains his authority from agreement of the parties and an award must be vacated when the arbitrator does not comply. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.,* 232 F.3d 383, 389 (4th Cir. 2000).

The court applied these principles in *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 55-59, 742 S.E.2d 359, 359-362 (2013), wherein the Court held that the arbitrator's failure to grant a motion to dismiss amounted to manifest disregard. "[T]he arbitrator erred in failing to grant Petitioners' motion to dismiss based upon the affirmative defense of section 40-11-370. Despite such error, Respondent seeks refuge in the narrow standard of manifest disregard. Indeed, manifest disregard is an exacting standard, but it is not insurmountable." *See, e.g.*, *N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100*, 256 F.3d 89 (2nd Cir. 2001) (affirming district court's vacating arbitration award where arbitrator manifestly disregarded the law by explicitly rejecting precedent of the Second Circuit and relying on opinions outside of the Circuit); *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997) (finding lack of indication that arbitrators rejected party's express urging to disregard the law necessitated reversing affirmance

of the arbitration award); *Spear, Leeds & Kellogg v. Bullseye Sec., Inc.*, 291 A.D.2d 255, 738 N.Y.S.2d 27 (N.Y. App. Div. 2002) (finding that because individual claimants, as a matter of law, cannot assert a cause of action to recover for wrongdoing done to a corporation, the rendering of award based on such a claim was properly vacated as manifest disregard of the law); *Wichinsky v. Mosa*, 109 Nev. 84, 847 P.2d 727 (Nev. 1993) (finding arbitrator demonstrated a manifest disregard of the law by awarding punitive damages in the absence of clear and convincing evidence of fraud, oppression or malice).

The *C-Sculptures* court held that "the governing law ignored by the arbitrator [is] well defined, explicit, and clearly applicable[,]" and consequently, the manifest disregard standard has been met. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58-59, 742 S.E.2d 359, 361-362 (2013). In this case, the arbitrator also ignored well defined, explicit, and clearly applicable law when he failed to dismiss the case and grant D.R. Horton's motion for summary judgment that Respondent lacked standing, was not the real party in interest and failed to apply basic South Carolina contract law. Accordingly, like the Petitioners in *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 55, 742 S.E.2d at 360, D.R. Horton seeks relief from the award.

The arbitrator knew of the clearly applicable legal principle that courts shall grant summary judgment if the conditions for such relief are met and that courts shall enforce contracts as they are written. The standard for summary judgment is well-known and well-understood among judges, lawyers, and arbitrators. Rule 56(c) of the South Carolina Rules of Civil Procedure ("SCRCP") requires that summary judgment be granted:

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(c), SCRCP. Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct. App. 2001).

D.R. Horton met the standard for summary judgment and Respondent did not demonstrate any genuine issue for trial regarding Respondent's lack of standing or as a real party in interest in this case. The issue should have been resolved using basic contract law. The facts are straightforward. The homeowners are deeded the interior and exterior of their specific units and they are individually responsible for the maintenance to the interior and exterior of their townhomes. Pursuant to the CCRs for Mansfield at Park West, the individual homeowners have the right and obligation to maintain and repair the units. The original CCRs provide that:

> Each Owner shall maintain his or her Unit and all structures, parking areas, backyards and other improvements comprising the Unit in a manner consistent with the standards of Mansfield at Park West and all applicable covenants, unless such maintenance responsibility is otherwise assumed by or assigned to the Townhome Association[.]
>
> ... Each Owner's maintenance responsibility shall include, but shall not be necessarily limited to, the following:
>
> (b) maintenance, repair, and replacement as necessary of the exterior surfaces of the Units ... and,
>
> (e) maintenance, repair and replacement as necessary of the roof including shingle and roof decking of the Unit.

CCRs, § 5.2. (ROA pp. 318-19) Notably, the Respondent HOA has no right, obligation or responsibility to do any of the above, and the amendments do not change that. The amendments were done only to be an expedient way to circumvent the townhome owners having to prove facts for entitlement on each of their units and to evade the limits on class action arbitration. The United States Supreme Court decided that parties cannot be forced to arbitrate class claims unless they have specifically agreed to that issue. *Lamps Plus. Inc. v.*

Varela, 139 S. Ct. 1407 (2019); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcing as written arbitration agreements that preclude class action arbitration). The second amendment to the CCRs was a thinly veiled end run to evade restrictions on class actions in arbitrations, but it did not provide the HOA with a real party in interest stake in the matter.[5] Based on the foregoing, the homeowners would be the real parties in interest. The HOA has no stake in the outcome of the case. Moreover, *Respondent agreed that no amendment to the CCRs has changed the homeowners' obligation to repair and maintain the exterior, roof, and fencing.* (30(b)(6) Depo. of Plaintiff, 23:15-24:5 (ROA pp. 1083-1084), 25:22-26:10 (ROA pp. 1085-1086), 27:11-17 (ROA p. 1087), 52:9-53: 1 (ROA pp. 1088-1089), 60:18-22 (ROA p. 1090), 61:3-8 (ROA p. 1091), 76:5-9 (ROA p. 1092))

Respondent attempted to imbue itself with standing by modifying the CCRs in the Second Amendment; however, the CCRs itself prohibit application of any such modification for three years from the date an amendment is recorded. Additionally, any amendment pursuant to §18.1 may not be made until *after* the initial twenty-year term, which does not expire until September 20, 2027. Section 18.1 provides that:

> The covenants and restrictions of this Declaration shall run with and bind the land . . . until September 30, 2027, unless otherwise expressly limited herein, *after which time* said covenants and restrictions shall be automatically extended for successive periods of ten (10) years unless an instrument signed by Seventy-five (75%) percent of the Unit Owners has been recorded, *agreeing to change* said covenants and restrictions in whole or in part. Provided, however, that *no such agreement to change* shall be effective unless made and recorded three (3) years in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every Owner at least ninety (90) days in advance of any action taken. (Emphasis added).

[5] The HOA also amended the dispute resolution provision in violation of the CCRs. D.R. Horton also has rights under that provision. Compare CCR §§ 17.1-17.6 in the Second Amended CCR with Article XVII in the CCR and the First Amended CCR. (ROA compare pp. 208-209 with pp. 337-340)

The CCRs provide that an amendment to change the covenants and restrictions in whole or in part will **not** be effective until after the initial twenty-year term and not "unless made and recorded three (3) years in advance of the effective date of such change, and unless written notice of the proposed agreement is sent to every Owner at least ninety (90) days in advance of any action taken." CCRs, §18.1. The CCR contract by and among D.R. Horton and every homeowner at Mansfield at Park West, specifically allows amendments, but those amendments do not take effect until the latest of September 30, 2027 and three years after the amendment is recorded. *See* CCRs, §18.1. (ROA p. 341) This is simple and basic. This is the contract.

The amendment the HOA uses to attempt to acquire standing in this case was passed on March 1, 2021 and recorded on March 9, 2021 just *three days* before the lawsuit was filed. The amendment purported to provide that "at its sole discretion [Respondent] shall have the right and obligation to pursue claims for faulty design and construction of the townhome exteriors and exterior building components and installation thereof[.]" CCRs, § 5.1. (ROA compare p. 209 with pp. 318-319)) Such an amendment may only be applied prospectively, three years after the amendment is recorded by the terms of the CCRs and after the initial twenty-year term.[6] Accordingly, Respondent is not, and for three years after September 30, 2027 cannot be, the Plainitff in the case and it does not have standing to bring the case as a real party in interest. Applying the amendment to this case violated the very CCRs that Respondent used to attempt to create standing.

Additionally, because the townhome owners retained all rights and obligations to maintain and repair the interior and exterior of each townhome, including their individual roofs, the putative Respondent had no legitimate interest in the lawsuit – no obligation to repair,

---

[6] Prospective amendment requirements in CCRs, like the initial twenty-year term and three-year prior notice in this case, allow parties to prepare for any upcoming changes.

replace, or modify any building components, no obligation to provide any lawsuit funds to any individual townhome owner, and no obligation to disburse the funds in any way. The Respondent simply has no real stake in the lawsuit and no right to damages for which it has suffered no harm. Rule 17(a), SCRCP requires that every action be brought by the real party in interest to have standing. "Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of Hunley, Inc.,* 369 S.C. 20, 28, 630 S.E. 2d 474, 479 (2006). "Standing is a fundamental requirement in instituting an action." *Hawkins v. Hammond*, 437 S.C. 36, 43, 875 S.E. 2d 60, 63 (Ct. App. 2022). A real party in interest is "the party who, by the substantive law, has the right sought to be enforced. It is ownership of the right sought to be enforced which qualifies one as a real party in interest." *Bank of Am. , N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013). That is not this Respondent. Respondent has not been harmed, has no obligation to use any proceeds from the lawsuit for the benefit of the real parties in interest, and attempted to insert itself into this lawsuit through breach of an agreement and to violate the law. Respondent is not a real party in interest. "[A] party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction." *Bardoon Properties v. Eldolon Corp.,* 326 S.C. 166, 485 S.E.2d 371 (1997).

D.R. Horton moved for summary judgment on this issue, argued the issue in its pre-hearing brief, and at the arbitration hearing as well. (ROA pp. 97-264; 558-631; 984-996) (7/31/2023 Tr. pp. 314 line 12 - 326 line 4 (ROA pp. 1154-1166)) There was no unresolved factual question to preclude the arbitrator from granting summary judgment to D.R. Horton prior to or at the arbitration.

The law is clear and well defined on this issue. Contracts in South Carolina are to be enforced. *See e.g., Jordan v. Security Group, Inc.,* 311 S.C. 227, 230, 428 S.E.2d 705, 707

(1993). “Where an agreement is clear and capable of legal interpretation, the court’s only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.” *Id.* Sound public policy demands that courts enforce contracts. Likewise, sound public policy requires that arbitrators not be allowed to dispense their own contract nullification proclivities over basic contract law. South Carolina and federal law favor arbitration; however, it is the parties who generally decide whether to arbitrate. If arbitrators are permitted to ignore basic contract law with a cursory conclusory statement that makes no attempt to interpret or enforce the contract, commercial entities will choose anything but arbitration for their dispute resolution needs. In this case, the arbitrator was aware of the contract. The arbitrator was aware of the law. The arbitrator is an experienced attorney. The arbitrator failed to grant D. R Horton summary judgment before the arbitration hearing when he should have done so. The arbitrator failed to apply clear and well-defined South Carolina law that contracts are to be enforced when he failed to enforce the CCRs and when he failed to grant D.R. Horton summary judgment on the issue of Respondent’s lack of standing and real party in interest status – all in manifest disregard or perverse misconstruction of the law.[7] And he failed to issue a reasoned award on the issues. Litigants choose arbitration as an alternative to the courts due to speed, cost, and control of the choice of the type of award, but when the result lacks any semblance of justice, fairness, or the agreed upon award, arbitration will no longer be a viable choice. The construction bar is small and informed. What occurred here will not go unnoticed.

The trial court’s Order failed to account for the changes to the CCRs and Appellant’s rights

[7] While Respondent argued that D.R. Horton lacks standing to challenge the Second Amended CCRs at issue here, this position is contradicted by the terms of the CCRs. The CCRs explicitly provide D.R. Horton, the Declarant, rights in the CCRs. CCRs, § 1.2. (ROA p. 312)

under the CCRs. In its Order on Appellant's Motion to Vacate, the trial court referenced only one provision of the CCRs and only a portion of it, which caused it to misunderstand the situation. The Court also focused on whether D.R. Horton is a current owner; however, being a current owner *vel non* does not deprive it of its rights under the CCRs. Specifically, the trial court did not address the provision stipulating that

> [t]he covenants and restrictions of this Declaration shall run with *and bind the land* . . . until September 30, 2027, unless otherwise expressly limited herein, *after which time* said covenants and restrictions shall be automatically extended for successive periods of ten (10) years unless an instrument signed by Seventy-five (75%) percent of the Unit Owners has been recorded, agreeing to change said covenants and restrictions in whole or in part. Provided, however, that *no such agreement to change shall be effective unless made and recorded three (3) years in advance of the effective date of such change*, and unless written notice of the proposed agreement is sent to every Owner at least ninety (90) days in advance of any action taken.

CCR § 18.1 (emphases added) (ROA p. 341).

It is undisputed that Respondent did NOT comply with this provision of the CCRs. Moreover, the Court did not address how this provision interacts with section 1.3 of the CCRs, upon which Respondent relies. Specifically, Article I describes *who* can amend the CCRs. When D.R. Horton owned any of the property only D.R. Horton could amend the CCRs. After D.R. Horton no longer owned any of the property, then 75% of property owners could amend the CCRs if they followed the procedures. *See* CCR § 1.3. That is the who. There is also the when and how.

Article XVIII describes the *when* and *how* the CCRs can be amended by the homeowners — the when is after 2027, and the how requires the amendment be recorded for three years and with 90-days prior notice to owners before it has any effectiveness. *Id.* § 18.1.[8] Every single

[8] Respondent and the homeowners did not follow this procedure, nor was there any amendment to the procedure.

requirement was violated. The Arbitrator's Award reflects manifest disregard of this distinction and frustrates the parties' intent in creating the CCRs. The CCRs protect not only the current owners, but also the developer, D.R. Horton. It retains an interest in the CCRs being followed. The initial 20-year period is purposely chosen and was part of the transaction documents at purchase. The trial court's failure to address this interaction perpetuates that error. It is difficult to not look at how it also encourages other homeowner associations to engage in similar tactics, which if Appellant's assessment of what occurred is correct, the Respondent, the townhome owners, and their counsel colluded to amend the CCRs to attempt to imbue the Respondent with standing as a subterfuge to overcome the fact that they could not bring a class action in arbitration. *Lamps Plus. Inc. v. Varela*, 139 S. Ct. 1407 (2019). The second amendment to the CCRs was a thinly veiled end run around restrictions on class actions in arbitrations. D.R. Horton's rights under the CCRs were simply whisked away by the arbitrator and by the trial court in manifest disregard of the contracts.

Additionally, because the townhome owners retained all rights and obligations to maintain and repair the interior and exterior of each townhome, including their individual roofs, the putative Respondent had no legitimate interest in the lawsuit – no obligation to repair, replace, or modify any building components, no obligation to provide any lawsuit funds to any individual townhome owner, and no obligation to disburse the funds in any way. Respondent is not a real party in interest. "[A] party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction." *Bardoon Properties v. Eldolon Corp., 326 S.C. 166, 485 S.E.2d 371 (1997).*

Another change to the CCRs that should have been declared null and void is the deletion of Article XVII, entitled Dispute Resolution and Limitations on Litigation, and its subsections

17.1 - 17.6. Replacement of Article XVII with Respondent's amendment requires Declarant (D.R. Horton) to resolve disputes in arbitration with a single arbitrator. (ROA compare pp. 208-209 with 337-340) This also took away Appellant's rights.

D.R. Horton retains an interest in the CCRs and has a right to enforce the terms of the amendment process as the Declarant. The arbitrator manifestly disregarded D.R. Horton's rights and the law when it failed to grant Appellant summary judgment on this issue and then failed to find for Appellant on the CCR issues in the award.

This issue is not limited to this case or to Appellant. This is an end run around the prohibition of forced class action arbitrations that will be used repeatedly in South Carolina if this decision is allowed to stand. It will have far reaching implications on the willingness of businesses to use arbitration rather than the over-burdened courts. If arbitration is no longer seen as a means to justice, then it will not be used.

D.R. Horton requests that the Court dismiss the case for lack of standing and lack of a real party in interest, as the arbitrator should have done. Then the Court need not reach any of the other issues herein.

II. THE CIRCUIT COURT ERRED BY NOT VACATING THE AWARD OF THE ARBITRATOR, WHO VIOLATED THE PARTIES' AGREEMENT FOR A REASONED AWARD, WHICH THE APPELLANT REQUESTED IN ORDER TO ASSURE CORRECT ANALYSIS OF THE FACTS AND LAW BY THE ARBITRATOR.

Under the same facts and law discussed above, the arbitrator also exceeded his authority and manifestly disregarded the law when he failed to address the issue of standing, real party in interest, and South Carolina contract law in his award in anything more than a cursory conclusory statement. A conclusory statement is not a reasoned award. *Stage Stores, Inc v. Gunnerson,* 477 S.W.3d 848 (Tex. App. 2015) (finding that an award was not a reasoned award

when it failed to discuss an issue that was thoroughly discussed during the arbitration proceedings).

The trial court's decision suggests that a reasoned award was not required and simultaneously, that the award was somehow reasoned enough because it decided that Appellant's two short form proposed awards were not "more reasoned."[9] Appellant asserts that the trial court misunderstood and that misunderstanding caused it to err on the issue of Appellant's right to a reasoned award.

Prior to the arbitration hearing commencing, the parties and the arbitrator agreed that a reasoned award would be issued. (ROA pp. 1055-1056; 265-298; 1045-1054) That is not disputed. That was their contract. It must be respected. Neither the arbitrator nor Respondent's counsel has stated otherwise. However, Respondent's counsel danced around the issue by saying that the arbitrator decides procedure and also that the award *was* reasoned. That is not the same thing as saying there was no agreement for a reasoned award before the hearing began. Unless and until the arbitrator and Respondent's counsel explicitly state otherwise, the Court should accept that the parties agreed to a reasoned award because counsel has made that representation and neither the arbitrator nor opposing counsel has disputed the veracity of Appellant's statement.[10] Appellant also included an Affidavit confirming that a reasoned award was agreed to, which was also not refuted. Affidavit of John Crawford. (ROA pp. 1055-1056)

Because a reasoned award was agreed to, the arbitrator's scope was defined to include a

[9] It is the arbitrator who has the obligation to issue the reasoned award, not the parties. The parties were required to provide a proposed award. Appellant provided a 21-page reasoned award in which it prevailed. It also provided short form barebones awards for the arbitrator to begin drafting his award with in case the arbitrator chose not to use Appellant's 21-page award. The trial court mistakenly deemed those short forms as "reasoned." (ROA pp. 632; 1041)

[10] Therefore, the Court's reliance on cases where the parties did not agree to a reasoned award—such as *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997), does not apply.

reasoned award as to all significant issues and the damages. Any award other than a reasoned award exceeded the arbitrator's authority and violated the arbitrator's requirements. *See Stage Stores, Inc v. Gunnerson,* 477 S.W.3d 848 (Tex. App. 2015) (finding that an award was not a reasoned award when it failed to discuss an issue that was thoroughly discussed during the arbitration proceedings); *Vold v. Broin & Assocs.* 2005 S.D. 80, 699 N.W.2d 482 (S.D. 2005) (The arbitrator's decision to issue a reasoned award bestowed a substantive right on Broin and, at the same time, imposed a substantive duty upon the arbitrator).

A conclusory statement is not a reasoned award, especially when the result is an end run around United States Supreme Court precedent on an issue that was thoroughly discussed in the arbitration proceedings, such as the issues of standing, real party in interest, and basic contract law regarding the amendments to the CCRs in this case. (7/31/2023 Tr. pp. 314 line 12 – 326 line 4 (ROA pp. 1154-1166)) *See Stage Stores, Inc v. Gunnerson,* 477 S.W.3d 848 (Tex. App. 2015) (finding that an award was not a reasoned award when it failed to discuss an issue that was thoroughly discussed during the arbitration proceedings). Rejecting language like the cursory language in the award in this case, the *Leeward Const.* court held that the conclusory statement: "having heard all of the testimony, reviewed all of the documentary proofs and exhibits, [the arbitrator does] not find support for STI's claims. . . ." was not a reasoned award. *Leeward Const. Co., Ltd. V. Am. Univ. of Antigua-College of Medicine,* 826 F.3d 634, 640 (2nd Cir. 2016). In fact, the only issue that the arbitrator provided a reasoned award for in this case was the issue of gross negligence. Everything else was cursory, conclusory, or simply announcing a damage number.

An arbitrator gains his authority from agreement of the parties. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.,* 232 F.3d 383, 389 (4th Cir. 2000) ("[w]hen, as here, the award does not draw its essence from the governing agreement, and the

arbitrator has exceeded his authority under the agreement, courts have no choice but to refuse enforcement of the award”). In this case, the parties agreed to a reasoned award. But when the arbitrator failed to provide a reasoned decision regarding all issues other than gross negligence, he exceeded his authority and manifestly disregarded the law because he had no authority to issue an award without a reasoned decision as to all the significant issues in the case. The issue is discussed thoroughly in *Vold v. Broin & Assocs.* 2005 S.D. 80, 699 N.W. 2d 482 (S.D. 2005):

> Arbitrators possess bROAd, but not unlimited, authority. *Missouri River Servs., Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir 2001) (following *Trailmobile Trailer, LLC v. Int'l Union of Electronic, Electrical, Salaried, Mach. & Furniture Workers, AFL-CIO*, 223 F.3d 744, 747 (8th Cir 2000)). Grounds for vacating an arbitration award are provided in the Federal Arbitration Act (FAA). 9 USC § 10 (2002). Section 10 of the FAA lists several bases for vacating an arbitration award. In addition, circuit courts may also vacate arbitration awards that are "completely irrational" or that "evidence a manifest disregard for the law." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir 2001) (alteration and citation omitted). . . .
>
> An arbitration award can be set aside when the arbitrator "exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 USC § 10(a)(4). This award exceeded the arbitrator's powers because the arbitrator violated the rules he agreed to follow. *See generally Gas Aggregation Serv., Inc. v. Howard Avista Energy, LLC,* 319 F.3d 1060, 1068- 69 (8th Cir 2003) (stating that an arbitration decision evinces a manifest disregard for the law when it identifies a substantive rule and then proceeds to ignore it). . . .
>
> "Substantive law" "creates, defines, and regulates the rights, duties, and powers of the parties." *Id.* at 1443. Vold contends that the "arbitrator determined that he had no duty under the AAA Construction Industry Arbitration Rules to render a 'reasoned' award." Are we to conclude, then, that the arbitrator, after issuing his written order, simply had the power to change his mind without notice or explanation? Once the arbitrator ordered that the award he would issue would be reasoned, his powers were defined. The arbitrator's decision to issue a reasoned award bestowed a substantive right on Broin and, at the same time, imposed a substantive duty upon the arbitrator.

An arbitrator exceeds his powers if the issue resolved by him is not within the scope of the agreement to arbitrate. Any award other than a reasoned award was outside the scope of the

arbitration. The South Carolina Code of Ethics for Arbitrators, Canon I (F) supports the rights of parties to an arbitration to receive the type of award the parties agree should be issued. Canon I (F) requires that "[w]hen an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules." The Code of Ethics is not just aspirational, advisory, or voluntary. It is required by the South Carolina Alternative Dispute Rules. SC ADR Rules. Rule 1 of the SC ADR Rules says that the SC ADR Rules apply to arbitrations in the state. Rule 1, SC ADR Rules. Rule 21 (b) of the SC ADR Rules says that the Code of Ethics applies to arbitrators. Rule 21 (b), SC ADR Rules. As part of the South Carolina Rules of Court, Canon I (F) is mandatory. Rule 21 (b), SC ADR Rules In this case, the arbitrator had the obligation to render a reasoned award as to all significant issues within the case. It was not within the scope of the arbitration for the arbitrator to issue anything less than a reasoned award. Accordingly, the arbitrator exceeded his authority and manifestly disregarded the law when he failed to render a reasoned award.

The trial court, relying on the Consent Order to arbitrate stated that the arbitrator controlled the format of the award. (ROA pp. 7-8). What the trial court failed to apprehend, however, is that the arbitrator limited his control of the format of the award when he agreed that the award would be a reasoned one. Moreover, the difference between a reasoned award and a standard award is more than just procedure, it provides substantive due process rights to the parties. A reasoned award requires an arbitrator to analyze and consider the facts and the law. A reasoned award is requested in arbitration so that an analysis is engaged in by the arbitrator to clarify thinking and understanding that leads to correct decisions.

The trial court also misunderstood the nature and purpose of Appellant's counsel providing the two short draft proposed orders to the arbitrator along with the fully reasoned 21-page award in which it would prevail. When a court or an arbitrator asks counsel to prepare proposed orders, counsel prepare them to assist the court or arbitrator *and to strengthen their client's position in the litigation*. Requiring counsel for any litigant to draft a fully reasoned order in which they argue against their client's interest by way of a fully developed reasoned award with facts and legal analysis as to why their client *should not prevail* flies in the face of a lawyer's duty to his or her client. It could be said to: (a) breach the duty counsel has to their client to represent the client's best interest, (b) breach the attorney-client privilege, and (c) breach the work-product privilege. Expecting D.R. Horton's counsel to provide the arbitrator a reasoned award detailing how D.R. Horton should *lose* the arbitration factually and legally is a distortion of the legal process and counsel complying with such a request may very well violate counsel's ethical duty to his client. The arbitrator in this case did not require that. The barebones draft award with Appellant losing (Short Form 2) -- as a starting point from which the arbitrator could begin to draft *his* reasoned award was the most that could be provided to assist the arbitrator's drafting. Counsel provided such short form draft awards with D.R. Horton losing and prevailing, respectively, as well as the 21-page reasoned award with D.R. Horton prevailing, in case the arbitrator found too much he wanted to change in the 21-page reasoned draft award counsel prepared. The two shorter draft awards were never intended to be "reasoned awards" on their own; nor would counsel think anyone would think of them as "reasoned" – they were barebones and intended to be starting points for the arbitrator from which the arbitrator would build his award. Of course, those were not "reasoned awards." A reasoned award includes facts, references to the evidence, and legal analysis as to all significant issues. Providing the proposed frameworks for an award the parties were asked to

provide should not be the basis for denying Appellant the reasoned award the arbitrator and parties agreed would be issued. Counsel was merely complying with what it understood the arbitrator had asked for without violating its duty to its client – hence the short forms as a starting point for the arbitrator and the 21-page reasoned award as a complete award.

Additionally, the Short Form 2 proposed award in which Respondent prevailed did highlight to the arbitrator the need for allocation of any damages awarded as that was a vital component of a reasoned award necessary to allow Appellant to seek recompense from the applicable contractors and subcontractors for their work in the actual construction of the townhomes. The arbitrator did not provide such classification, even when specifically requested.

Short Form 2 also did not include a reasoned award as to how Respondent would prevail as to standing and real party in interest in the context of the amendments to the CCRs due to the ethical and client responsibility issues discussed above, but also because Appellant could not conceive of any way that Respondent could prevail on such issues if the arbitrator applied basic South Carolina law as to standing, real party in interest, and contract law to the issue.

The arbitrator's failure to issue a reasoned award impacts the discussion of every other facet of this case because so little is provided for review. Additionally, D.R. Horton made it clear that a reasoned award was necessary for it to be able to seek contribution from the contractors it hired to perform the work at the development. A simple itemization by category of the damages was not even provided, even when asked for specifically. A simple ask. Was it to punish Appellant by eliminating Appellant's ability to seek contribution and indemnity from the contractors and subcontractors that built the townhomes? If so, that would exceed the arbitrator's authority. When parties agree to arbitration, "they do not bargain to have their dispute resolved by whim." *Waldo v. Cousins*, 442 S.C. 662, 668, 901 S.E.2d 276, 279 (2024). An award should be vacated "when

an arbitrator substitutes his personal policy views in place of a plainly binding legal principle." *Id.* at 669, 901 S.E.2d at 279–80. In *Waldo*, this occurred when an arbitration panel relied on common law rules that had clearly been superseded by statute. *See id.* at 668, 901 S.E.2d at 279. In this case it occurred when the arbitrator ignored the parties' agreement for a reasoned award as discussed above and manifestly disregarded the law of standing, real party in interest, and contract law when it ignored plain terms of the Declaration of Covenants, Conditions and Restrictions.

The trial court erred when it failed to recognize that a conclusory statement is not a reasoned award, especially as to an issue that would run afoul of United States Supreme Court precedent on forced class action arbitration and was thoroughly discussed in the arbitration proceedings, as the issue of standing and real party in interest was in this case. (7/31/2023 Tr. pp. 314 line 12 – 326 line 4 (ROA pp. 1154-1166)) *See Stage Stores, Inc v. Gunnerson,* 477 S.W.3d 848 (Tex. App. 2015) (finding that an award was not a reasoned award when it failed to discuss an issue that was thoroughly discussed during the arbitration proceedings). Rejecting language like the cursory language in the award in this case, the *Leeward Const.* court held that the conclusory statement: "having heard all of the testimony, reviewed all of the documentary proofs and exhibits, [the arbitrator does] not find support for STI's claims. . . ." was not a reasoned award. *Leeward Const. Co., Ltd. V. Am. Univ. of Antigua-College of Medicine,* 826 F.3d 634, 640 (2nd Cir. 2016).

Likewise, the standing and real party in interest issue in this case is significant and warranted more than just a conclusion. Like the *Leeward Const.* conclusory statement, the award here stated only:

> I have reviewed the Declaration of Covenants, Conditions, and Restrictions for Mansfield at Park West, along with the First and Second Amendments thereto and considered the testimony and arguments of counsel. I find the Plaintiff has standing to pursue the claims it has asserted.

The foregoing is a mere recitation or attestation of what the arbitrator said he considered and a conclusory statement. There is no reasoning. There is no discussion about the fact that the contract between the parties does not allow the Second Amendment to be effective until after September 30, 2027 and three years after it is recorded, that the Respondent has suffered no harm and has no damages and that the Respondent has no duty or obligation, to modify or repair the townhouses. A reasoned award required meaningful analysis; the arbitrator said nothing.

An arbitrator gains his authority from agreement of the parties. *See, e.g., Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.,* 232 F.3d 383, 389 (4th Cir. 2000) ("[w]hen, as here, the award does not draw its essence from the governing agreement, and the arbitrator has exceeded his authority under the agreement, courts have no choice but to refuse enforcement of the award"). In this case, the parties agreed to a reasoned award. But when the arbitrator failed to provide a reasoned decision regarding standing and real party in interest, he exceeded his authority and manifestly disregarded the law because he had no authority to issue an award without a reasoned decision as to all the significant issues in the case.
It was not within the scope of the arbitration for the arbitrator to issue anything less than a reasoned award. Accordingly, the arbitrator exceeded his authority and manifestly disregarded the law when he failed to render a reasoned award as to standing, real party in interest, and apply basic contract law.

In addition, the Second Amendment also removed <u>the entire section</u> entitled "**Dispute Resolution and Limitation on Litigation**" (the "Original Dispute Resolution Provision"). The Original Dispute Resolution Provision provided procedures that any of the bound parties had to follow in order to bring a claim related to an alleged construction defect. CCRs, § 17.1-17.6. (ROA pp. 337-340) The Original Dispute Resolution Provision provided that "[D.R. Horton]

shall have the right to meet in good faith and discuss the subject of the proceeding with the Owners, or the particular Owner, and to access, inspect, correct the condition of, or redesign any portion of the Community, including any improvement as to which a defect is alleged." (Id., § 17.1). It is undisputed that this did not occur.

Moreover, the Original Dispute Resolution Provision provided the following procedure for bringing construction defect claims:

- notice of claim in writing;
- the parties shall make every reasonable effort to meet in person and confer for the purpose of resolving the claim by good faith negotiation;
- if such meeting is unsuccessful, then the claimant must submit the claim to mediation; and
- if the mediation is unsuccessful, then the claimant must submit the claim to arbitration.

(CCRs, § 17.4).

In place of the Original Dispute Resolution Provision, the Second Amendment inserted the following:

> **ARTICLE XVII**
> **Dispute Resolution**
>
> Any dispute between the Association and the Declarant shall be submitted to binding arbitration with a single arbitrator agreed to by the parties or appointed by the Court. The arbitrator shall have the sole discretion to determine the rules and procedures of the arbitration and any law applicable thereto. The award of the arbitrator shall be final and binding.
>
> To the extent that there is any provision in the Declarations that conflict with this Amendment, the terms of this Amendment shall govern. The Board of the Association shall have the right to give the final meaning and interpretation of any term of the Declaration and Amendments thereto and shall have the right to modify any provision for which it determines impedes it from fulfilling its duties and obligations to the members of the Association provided that a least two-thirds (2/3) of the Board votes in favor of such interpretation and/or modification.

(the "Amended Dispute Resolution Provision"). Based on the Second Amendment, Respondent contends that it does not have to comply with the requirements laid out in the Original Dispute

Resolution Provision. The CCRs expressly state that D.R. Horton has the right to enforce the CCRs and any amendments or supplements until 2027. CCRs, § 1.2. (ROA p. 312)

Appellant has been denied its rights. Appellant did not agree to this modification to its dispute resolution rights or the manner in which this was used to force a class action arbitration.

For these reasons, the award of the arbitrator should be vacated and the trial court should be reversed.

III. THE CIRCUIT COURT ERRED BY NOT VACATING THE AWARD OF THE ARBITRATOR FOR HIS FAILURE AND REFUSAL TO ALLOCATE HIS AWARD AMONG THE APPELLANT'S REQUESTED CONSTRUCTION CATEGORIES, THEREBY IGNORING THE PARTIES' AGREEMENT FOR A REASONED AWARD AND DEPRIVING THE APPELLANT OF ITS RIGHT TO CONTRIBUTION AND INDEMNIFICATION FROM ITS RESPECTIVE CONTRACTORS AND SUBCONTRACTORS THAT CAUSED THE AWARDED DAMAGES.

The arbitrator awarded a very specific amount of damages: $ 3,057,112.48. The arbitrator awarded this precise lump-sum in damages to Respondent without any reasoning or explanation. The arbitrator spent three pages on the combined issues of statute of repose and liability, but only a single conclusory sentence as to damages. One sentence.

When the arbitrator did not provide Appellant a reasoned award for damages, Appellant did not receive a valid award. A reasoned award is requested in arbitration so that an analysis is engaged in by the arbitrator. An analysis clarifies thinking and understanding and leads to correct decisions. Failure to engage in the analysis and to provide the reasoning leads to an award that does not have credibility because there is no reasoning. Moreover, a reasoned award was required, Appellant was entitled to one, Appellant needed one, and Appellant was denied the award to which it was entitled.

The arbitrator failed to provide a reasoned award as to damages, exceeded his

authority and manifestly disregarded the law. The law discussed above regarding reasoned awards applies here, as well and is incorporated herein. D.R. Horton even *asked the arbitrator to clarify the damages portion of the award*, which the arbitrator denied without explanation. (ROA pp. 657-659; 4) Clarifying the damages portion of the award would have taken nothing from the Respondent but would have provided D.R. Horton the information it needs to address the issues with its contractors and subcontractors.

Courts have rejected lump sum awards, like the one the arbitrator awarded, as the basis for a developer seeking contribution, indemnification, and other remedies from negligent contractors and subcontractors. In *D.R. Horton, Inc. v. Builders FirstSource – Se Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (S.C. App. 2018), the Court decided that "[b]ecause the verdict was a general verdict it is impossible to determine how the jury allocated damages" and that "an unreasoned award for damages only, proves fatal to D. R. Horton's claim for indemnification." *Id.* at 153. D. R. Horton's request for a reasoned award on this issue was not frivolous or disrespectful – it was a necessary part of the reasoned arbitration award that D.R. Horton was denied for no justifiable reason. It was one of the reasons Appellant wanted a reasoned award.

The arbitrator obviously performed some sort of calculation to reach an award that ended in 48 cents, but for some reason unbeknownst to D. R. Horton refused to provide a reasoned award on this issue. The siding, roofs, and windows were not installed by the same contractors and subcontractors, which means D.R. Horton needed a reasoned award as to the damages. Denying a reasoned award as to damages "punishes" D.R. Horton beyond the boundaries of the scope of the arbitration by denying it any ability to seek resolution with its

contractors and subcontractors. This is beyond the scope of the arbitration and beyond the authority of the arbitrator. The arbitrator was not entitled to determine the rights of the Appellant against the contractors and subcontractors at Mansfield, but that is precisely what he did by refusing to allocate his award, especially when a reasoned award was required.

D.R. Horton filed a motion for clarification regarding the damages award, which the arbitrator denied. (ROA pp. 657-659; 4). The arbitrator failed to provide a reasoned award as to each of the foregoing damages issues, exceeded his authority, and manifestly disregarded the law. The arbitrator's refusal to disclose the damages reasoning is concerning and confusing. It certainly devalues arbitration as a dispute resolution mechanism.

Just as a conclusory statement is not a reasoned award, especially as to an issue that was thoroughly discussed in the arbitration proceedings, a lump sum damage award that fails to discuss anything at all about the damages and simply announces an amount is not a reasoned award. *See Stage Stores, Inc v. Gunnerson,* 477 S.W.3d 848 (Tex. App. 2015) (finding that an award was not a reasoned award when it failed to discuss an issue that was thoroughly discussed during the arbitration proceedings). A lump sum damages award in this type of case that involved years of use of the building components and three different building components is less reasoned than the conclusory statement in *Leeward Const.* was. *Leeward Const. Co., Ltd. V. Am. Univ. of Antigua-College of Medicine,* 826 F.3d 634, 640 (2nd Cir. 2016). It is hard to imagine how a damages award could be less reasoned than the lump sum award in this case.

A reasoned award in an arbitration proceeding is supposed to provide the parties with an understanding of the components of the award as to the significant issues in the arbitration. That is the job the arbitrator agrees to perform when a reasoned award is agreed to by the parties. As discussed in the standing and real party in interest section above, an arbitrator gains his authority

from agreement of the parties and is bound by Canon I (F). In this case, the parties agreed to a reasoned award. When the arbitrator failed to provide a reasoned decision regarding damages, he exceeded his authority and manifestly disregarded the law because he had no authority to issue an award *without* a reasoned decision. An arbitrator exceeds his powers if the issue resolved by him is not within the scope of the agreement to arbitrate. Any award other than a reasoned award was outside the scope of the arbitration. A precise lump sum number ending in 48 cents in a complex damages case is not a reasoned award. This is especially true in a construction defect case when the developer needs the clarity to pursue its rights as to the contractors and subcontractors who performed the installations.

In this case, the arbitrator had the obligation to render a reasoned award as to all significant issues within the case. It was not within the scope of the arbitration for the arbitrator to issue anything less than a reasoned award, which he failed to do as to all damages issues. Even when D.R. Horton requested clarity as to the damages award, the arbitrator denied D.R. Horton a reasoned award.

CONCLUSION

This case is a blatant end run around the United States Supreme Court prohibition on forced class action arbitration. If allowed to stand, it will fundamentally change construction defect law in South Carolina, among other applications. It will also discourage arbitration.

The arbitration award should be vacated, the trial court's Order reversed, and the case dismissed because the law of standing, real party in interest, and the contract law at issue are clear, well defined, and should not have been manifestly disregarded by the arbitrator. The CCRs could not be amended at the time that they were by the terms of the CCRs, and no amendment could be effective for at least three years after recordation. The lawsuit was filed and the

amendments used within one week. Simple contract law forbade this. Additionally, the individual townhome owners should have filed individual claims in arbitration rather than attempt an end-run around the United States Supreme Court's prohibition of forced class action arbitration through what appears to have been collusion with their attorney and HOA via the CCRs' amendments. Even under those amendments, the HOA had no stake in the litigation because it had no obligation to pursue any claims and *no obligation to make any repairs to any townhome or provide any litigation proceeds to any townhome owner*. The HOA does not have standing and is not a real party in interest. If the court agrees, it need not consider the other issues.

The parties and arbitrator agreed that a reasoned award would be issued. The trial court erred when it concluded that parties are not entitled to anything more than a standard written award. Such a conclusion would upend essentially every set of arbitration rules available to litigants and requires litigants to forfeit the very choices arbitration is supposed to afford them. Under the trial court's model, arbitration will be disfavored by sophisticated litigants. The trial court's Order relegates a "reasoned award" that explains the who, what, and why versus a standard award that merely announces or attests to the decision as merely procedural. However, the difference is substantive. And the parties and the arbitrator agreed to a reasoned award, and no one has disputed that. And the Federal Arbitration Act also applies to this case in interstate commerce, and reasoned awards are not prohibited under the FAA. Accordingly, the arbitrator exceeded his authority, manifestly disregarded the law, and violated the South Carolina Supreme Court's Code of Ethics for Arbitrators when he *failed to issue the agreed upon reasoned award as to standing, real party in interest and basic contract law.* The trial court's attempt to distill a basis for the arbitrator's award on this issue misses the mark because the *arbitrator* was required

to provide the reasons. In an attempt to preserve the award, the trial court looked at a portion of only one provision of the CCRs thereby misunderstanding the issue and leading it to an erroneous analysis – and it was not the arbitrator's analysis. The arbitration award should be vacated, and the trial court's Order reversed, and a new arbitration ordered with a new arbitrator.

The arbitrator also failed to issue a reasoned award as to the amount and allocation of damages, thereby exceeding his authority, manifestly disregarding the law and violating the South Carolina Supreme Court's Code of Ethics for Arbitrators when he failed to issue the agreed upon reasoned award. The parties agreed to a reasoned award and were not provided one. A reasoned award for the amount and allocation of damages was needed by Appellant and the arbitrator was aware of the need and the reasons for the needed clarity as to damages but failed to provide the reasoned award to which the parties agreed. This amounted to a putative-type award against Appellant, which was not allowed under the scope of the arbitration. The arbitrator was not entitled to determine the rights of the Appellant against the contractors and subcontractors at Mansfield, but that is precisely what he did by refusing to allocate his award, especially when a reasoned award was required. The arbitration award should be vacated, and the trial court's Order reversed because the arbitrator exceeded his authority, manifestly disregarded the law, and violated the South Carolina Supreme Court's Code of Ethics for Arbitrators when he failed to provide a reasoned award on damages.

If the case is not dismissed entirely due to the HOA's lack of standing and because it is not a real party in interest, then a new arbitration should be ordered to be conducted before a new arbitrator who will issue a reasoned award based on the law and facts.

Dated November 5, 2025

s/ Carl F. Muller
Carl F. Muller, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.

PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com

Thomas E Dudley, III (S.C. Bar No.: 66154)
John T. Crawford, Jr. (S.C.Bar No.: 69682)
Kenison, Dudley, & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864)- 242-4899

Attorneys for D.R. Horton, Inc.

The undersigned certifies this Final Brief complies with Rule 211(b), SCACR.

s/ Carl F. Muller

Carl F. Muller, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.
PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com