THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas for the Ninth Circuit

The Honorable G. D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2025-002136

SHELTER, LLC, JASON HIGHSMITH, AND KACIE HIGHSMITH..... Respondents

v.

DESIGN GAPS, INC., DAVID GLOVER, AND EVA GLOVER ..... Appellants

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INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

A. The Agreements 2

B. The Arbitration 5

II. PROCEDURAL HISTORY 8

STANDARD OF REVIEW 9

ARGUMENT 10

I. THE TRIAL JUDGE ERRED IN RULING THE MOTION TO VACATE OR MODIFY THE ARBITRATOR'S FINAL AWARD WAS NOT TIMELY FILED 10

A. Time for Filing a Motion to Vacate Was Tolled Until the State Court Resumed Jurisdiction 11

B. The Ninety Day Limitation Period for Filing a Motion to Vacate in the South Carolina Arbitration Act is Subject to Equitable Tolling 12

C. The Trial Judge's Error in Determining Appellants Did Not Timely File the Motion for Vacatur of the Arbitration Award is Reason Alone for Reversing the Trial Court's Order 14

II. THE TRIAL JUDGE ERRED IN FAILING TO FIND THE ARBITRATOR EXCEEDED HIS POWERS 14

A. The Trial Judge Erred in Failing to Find that the Contract Deadlines Imposed by the Arbitrator were Beyond the Scope of the Contracts 14

B. The Trial Judge Erred in Finding the Arbitrator Issued a Reasoned Award as Required by the Agreement Between the Parties and the AAA Rules of Commercial Arbitration 16

1. Form of Reasoned Award 16

2. Appellants' Ten Counterclaims Should Have Been Subject to a Reasoned Award 18

3. The Trial Judge Erred in Failing to Determine that the Arbitrator Did Not Provide a Reasoned Award and Exceeded His Powers 19

III. THE TRIAL JUDGE ERRED in FINDING THAT THE ARBITRATOR DID NOT REFUSE TO HEAR EVIDENCE TO THE CONTROVERSEY AND DID NOT CONDUCT THE HEARING ON THE MERITS IN SUCH A WAY TO PREVENT SUBSTANTIAL PREJUDICE TO APPELLANTS' RIGHTS 20

IV. THE TRIAL JUDGE ERRED IN FINDING THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW 24

A. Arbitrator's Application of the Fair Use Doctrine to Overcome Copyright Infringement Constitutes Both a Manifest Disregard of the Law and the Arbitrator Exceeding His Powers 25

1. Arbitrator's Application of the Fair Use Doctrine to Overcome Copyright Infringement is a Reckless Disregard of Well-Established Statutory and Judicial Precedent Concerning the Legal Principal 25

2. The Wrongful Application of the Fair Use Defense by the Arbitrator Also Resulted in the Arbitrator Exceeding His Powers 28

3. Arbitrator's Manifest Disregard of the Law and the Arbitrator Exceeding His Powers Under § 15-48-130(a)(3) Both Justify Vacating the Arbitrator's Final Award 29

B. Arbitrator's Refusal to Acknowledge that Appellants Materially Performed Under the Terms of the Contracts and Respondents Breached the Contracts Demonstrates the Arbitrator Failed to Follow Well-Established Black Letter Law of Contracts 30

C. Trial Judge Erred in Failing to Find the Arbitrator's Manifest Disregard of the Law Justifies Vacating the Final Award 32

V. THE TRIAL JUDGE ERRED IN GRANTING RESPONDENTS' PETITION TO CONFIRM THE ARBITRATOR'S FINAL AWARD AND FAILING TO INSTEAD VACATE THE aRBITRATOR'S FINAL AWARD 32

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 731 S.E.2d 869 (2012) 9

Ashley Furniture Indus. v. Sangiacomo N.A., 187 F.3d 363 (4th Cir. 1999) 23

Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) 27

Badgerow v. Walters, 596 U.S. 1 (2022) 11

Bannon v. Knauss, 282 S.C. 589, 320 S.E.2d 470 (1984) 31

Bergheim v. Sirona Dental Sys., 711 Fed. Appx. 43 (2d Cir. 2017) 17

Bldg. Graphics, Inc. v. Lennar Corp., 708 F.3d 573 (4th Cir. 2013) 22

Bond v. Blum, 317 F.3d 385 (4th Cir 2003) 26

Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301 (4th Cir. 2010) 23

Bouchat v. Baltimore Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir 2013). 27

Brammer v. Violent Hues Productions, LLC, 922 F.3d 255 (4th Cir. 2019) 27

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994) .. 27

Campione v. Best, 435 S.C. 451, 868 S.E.2d 378 (Ct. App. 2021) 10

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009) 9

Cat Charter, LLC v. Schurtenberger, 646 F.3d 836 (11th Cir. 2011) 17

Commodities & Minerals Enter. v. CVG Ferrominera Orinoco, C.A., 49 F.4th 802 (2d Cir. 2022) 17

C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013) 24

Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) 9

Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009) 24

Gowdy v. Gibson, 391 S.C. 374, 706 S.E.2d 495 (2011) 10

Hardaway Concrete Co. v. Hall Contr. Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007) .. 10

Hicks Unlimited, Inc. v. Unifirst Corp., 439 S.C. 623, 889 S.E.2d 564 (2023) 16

Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009) 12, 13

Hunt v. Forestry Comm'n, 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004) 9

In the Matter of Andros Compania Maritima, S.A. and Marc Rich & Co., A.G., 579 F.2d 691 (2d. Cir. 1978) 25

Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138 (Alaska 2009) 13

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir.1988) 21

Kimmer v. Wright, 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) 13

Leeward Constr. Co. v. Am. Univ. of Antigua - College of Med., 826 F.3d 634 (2d Cir 2016) 17, 18, 19

Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) 11

M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421 (4th Cir. 1986) 22

Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988) 13

Magnolia North Property Owners Assoc., Inc. v. Heritage Comm., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) 13

Mead v. Beaufort Cty. Assessor, 419 S.C. 125, 796 S.E.2d 165 (Ct. App. 2016) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) 21

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) 21

North Greenville College v. Sherman Construction Co., Inc., 270 S.C. 553, 556 243 S.E.2d 441, 442 (1978) 24

Ocana v. Am. Furniture Co., 2004 NMSC 18, 135 N.M. 539, 91 P.3d 58 (N.M. 2004) 13

Patten v. Signator Ins. Agency, Inc., 441 F.3d 230 (4th Cir. 2006) 15

Pittman Mortgage Company, Inc. v. Edwards, 327 S.C. 72, 488 S.E.2d 335 (1997) 14, 16

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) 21

Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469 (5th Cir. 2012) 17

Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) 27

Rodriguez v. Superior Court, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009) 12

Ross v. Ross, 394 S.C. 261, 715 S.E.2d 359 (Ct. App. 2011) 13

S.C. DOT v. Revels, 411 S.C. 1, 766 S.E.2d 700, (2014) 9

S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 437 S.E.2d 22 (1993) ... 20, 21

Sabre GLBL, Inc. v. Shan, 779 Fed. Appx. 843, 855 (3d Cir. 2019) 17

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) 31

Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., 57 F.4th 372 (2d Cir. 2023) 17

State v. Columbia Ry., Gas & Elec. Co., 112 S.C. 528, 100 S.E. 355 (1919) 11

Stolt-Nielsen S.A v. AnimalFeeds Int'l Corp., 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) 14

Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194 (4th Cir 1998) 26

Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) 10

Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985) 24

Tully Constr. Co. v. Canam Steel Corp., 684 Fed. Appx. 24 (2d Cir. 2017) 17

Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc., 618 F.3d 417 (4th Cir. 2010) 22

Waldo v. Cousins, 442 S.C. 662, 901 S.E.2d 276 (2024) 14, 15, 20

Statutes

17 U.S.C. § 107 26

17 U.S.C. § 410(c) 22

FAA, 9 U.S.C. § 10 .....8, 11, 13, 14

S.C. Code Ann. § 15 48 50(b) 20

S.C. Code Ann. § 15-48-130(a) 9, 15

S.C. Code Ann. § 15-48-130(a)(3) 14, 20, 29

S.C. Code Ann. § 15-48-130(a)(4) 20, 24

S.C. Code Ann. § 15-48-130(b) 10, 12

S.C. Code Ann. § 15-48-130(c) 9

S.C. Code Ann. § 15-48-30 9

S.C. Code Ann. § 15-48-50 ..... 9, 20, 24

SCAA, S.C. Code Ann. § 15-48-10 *et seq*. 13

Rules

Commercial Arbitration Rules and Mediation Procedures, R-21(b) (American Arbitration Association 2013) 16

Treatises

5 Am.Jur.2d Arbitration and Award § 11 (1962) 20

51 Am. Jur. 2d Limitation of Actions § 169 (2000) 12

54 C.J.S. Limitations of Actions § 115 (2005) 12

Richard R. Powell & Patrick J. Rohan, 6A *Powell on Real Property: Vendors and Purchasers*, P 882[2] at 81-223 (1995) 31

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err when he ruled that there was no timely motion to vacate or modify the Arbitrator's Final Award?

SUGGESTED ANSWER: Yes.

II. Did the trial judge err in failing to find that the Arbitrator exceeded his powers when imposing contract deadlines that went beyond the scope of the agreement and failing to issue a reasoned award based upon his findings pursuant to the AAA Commercial Arbitration Rules?

SUGGESTED ANSWER: Yes.

A. Did the trial judge err in failing to find that the contract deadlines imposed by the Arbitrator were beyond the scope of the contracts?

SUGGESTED ANSWER: Yes.

B. Did the trial judge err in finding that the Arbitrator issued a reasoned award?

III. Did the trial judge err in finding that the Arbitrator did not refuse to hear evidence and did not conduct the hearing on the merits in such a way to prevent substantial prejudice to Appellants' rights?

SUGGESTED ANSWER: Yes.

IV. Did the trial judge err in finding that the Arbitrator did not manifestly disregard the law?

SUGGESTED ANSWER: Yes.

V. Did the trial judge err in granting Respondents' petition to confirm the Arbitrator's Final Award and failing to instead vacate the Arbitrator's Final Award?

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This matter originates from an action whereby Respondents as Claimants filed an American Arbitration Association demand against Appellants as Respondents in an arbitration ("Arbitration"). Demand for Arbitration (). Respondent Shelter, LLC ("Shelter") provided the construction coordination at the residence, and the Respondents Jason Highsmith and Kacie Highsmith ("Highsmiths") owned the residence. The Arbitrator issued an award in favor of the Respondents and granted their request for attorneys' fees. Arbitrator's Final Award (). The claims in the Arbitration were breach of contract, promissory estoppel, and piercing the corporate veil. Appellants entered counterclaims in the Arbitration for negligence, breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, conversion, unfair and deceptive trade practices, quasi-contract, and violation of the copyright act. Binding Commercial Arbitration Respondents Revised Counterclaim ().

A. The Agreements

Respondents entered two contracts in August and September 2020 with Design Gaps to design and install various cabinet systems and the master closets ("Contracts") at the residence of the Highsmiths located at 376 Ralston Creek Street, Daniel Island, South Carolina ("Residence"). The first contract, dated August 18, 2020, was for $234,602.35 and was executed between the Highsmiths, Shelter and Appellant Design Gaps, Inc. ("Design Gaps") to provide cabinets in the kitchen, pantry, office, mudroom, various vanities, laundry, and game room bar of Residence. Contract to Provide Cabinets (). The second contract, dated August 18, 2020, and signed September 6, 2020, was for $97,634.59 and was executed only between the Highsmiths and Design Gaps to provide his-and-her master closets. Contract to Provide His-and-Her Master Closets (). The Contracts were silent with respect to any completion date.

The Highsmiths originally contracted with A Closet Case in Daniel Island to design and install the his-and-her master closets sometime in July 2020. A Closet Case Contract (). Unhappy with the A Closet Case quality soon after the A Closet Case installation, The Highsmiths contacted Design Gaps who had installed Downsview Kitchens cabinetry for the master bath and closets in the Highsmiths' previous home a few years prior to this installation.

The Highsmiths chose Design Gaps' lower price line of cabinetry instead of the higher end Downsview Kitchens line offered by Design Gaps. Similarly, the Highsmiths had selected the lower price line for the earlier contract for the Main House cabinetry at the urging of Jenny Butler, Shelter's product coordinator. The Highsmiths paid Design Gaps on September 6, 2020, in the amount of $97,634.59 to redesign and provide all new cabinetry for the his-and-her master closets.

With respect to copyright protection, both agreements expressly provided in bold type of the front of the agreement the following:

> "ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE EXPRESS WRITTEN CONSENT OF DESIGN GAPS, INC."

With respect to change orders or amendments to the agreements, each contract provided:

> "4. CHANGE ORDERS. All changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price. Any revised plans and specifications when signed and dated by the parties shall completely amend prior plans and specifications."

With respect to any breaches of the agreements, each contract provides the following:

> "13. BREACH OF CONTRACT. The Seller retains the right upon breach of this agreement by the Buyer or any unpaid balances to Design Gaps, Inc. to sell any goods or merchandise in the Seller's possession. In effecting any resale on breach of this agreement, the Buyer shall remain liable for any net deficiency on resale. The Seller shall be entitled to reasonable attorney's fees and costs."
>
> "13a. Buyer shall pay all monies when due in accordance with this contract and may not withhold any money or payment after substantial completion of work. Failure to pay will constitute a breach by buyer."

Each agreement also provides:

> "17. ARBITRATION. All disputes arising out of or in connection with this Agreement or any transaction hereunder shall be finally settled under the Commercial Arbitration Rules of the American Arbitration Association then in effect by an arbitrator appointed in accordance with such Rules."

and

> "18. ENTIRE AGREEMENT. This contract contains the entire agreement between the parties. There are no other agreements, verbal or otherwise, between the parties, except as contained in this contract, with addenda, or as contained in valid change orders."

When Design Gaps was substantially complete with installation of the his-and-her master closet at the Residence and had arranged for the delivery of all cabinetries at the Residence, Design Gaps reiterated its request for payment for the materials pursuant the terms and conditions of the Contracts. Instead of paying in accordance with the contract terms, the Highsmiths terminated Design Gaps through an email sent by their attorney within a few days following the request for payment on May 14, 2021. Upon information and belief, the Respondents realized that they had already committed to order Distinctive Design's Master closet cabinetry from drawings dated March 21, 2021. The Highsmiths used the $97,634.59 completed Design Gaps Master Closet cabinetry while living in the home until the third set of closet cabinets provided by Distinctive Design in the amount of $182,828.00 came in the following January 2022.

Shelter and Respondent Kacie Highsmith acknowledged that the designs that were to be placed in the Residence were provided by Design Gaps and remained the property of Design Gaps. Kacie Highsmith Deposition (). Nonetheless, Shelter confirmed that Bryan Reiss of Distinctive Design who was doing several projects for Shelter and cabinetry for a garage addition at the Residence allowed Bryan Reiss to have access to Design Gaps' designs when forwarded without permission via email by Jenny Butler on January 19, 2021. Email Jenny Butler Providing Drawings to Bryan Reiss ().

B. The Arbitration

The claims raised by Respondents in the Arbitration included breach of the Contracts by "(1) failing to timely complete the Project, (2) failing to deliver the contracted goods and services in a good and workmanlike manner free of defects, and (3) effectively abandoning the project"; promissory estoppel; fraud; and piercing the corporate veil/amalgamation. The Respondents alleged "actual, consequential and special damages, and attorney's fees and costs, are up to $350,000.00." Demand for Arbitration ().

The Appellants completely answered each of the allegations included in the complaint. Arbitration Answering Statement (). Furthermore, the Appellants settled upon the following counterclaims: negligence, material breach of contract, fraudulent misrepresentations, failure to mitigate damages, tortious interference with contract, civil conspiracy, unfair and deceptive trade practices, violation of the Copyright Act, conversion, and quasi-contract. Binding Commercial Arbitration Respondents Revised Counterclaim (). Appellants registered the designs with the Copyright Office and provided proof of the registration to the Arbitrator including the certificate of registration that had been issued. Email to Arbitrator Providing Copyright Registration (). Upon recognizing Jenny Butler's, Bryan Reiss', and Distinctive Design's vicarious or direct infringement of the Copyrighted works, David Glover motioned that these parties be joined to the Arbitration. Binding Commercial Arbitration Respondents Revised Counterclaim (). In an Interim Order issued on April 20, 2022, the Arbitrator determined that none of these parties have any contract with Design Gaps that call for any dispute to be arbitrated, and neither Shelter nor the Highsmiths consented to the joinder of these parties to the Arbitration. Interim Order on Motion to Join Additional Third-Party Respondents and Motion to Amend Respondents Counterclaim (). Therefore, the Arbitrator denied the Appellant' motion to join Jenny Butler, Bryan Reiss, and Distinctive Design to the Arbitration.

The merits hearing on the claims and counterclaims was held on May 26-27 and June 2, 2022, in Charleston, South Carolina. In the Interim Award of the Arbitrator issued on July 19, 2022, the Arbitrator determined that Respondents were entitled to recover $152,884.00 from Design Gaps alleging Respondents had paid $274,647.00 to Distinctive Design that would then be reduced by $121,763.00 allegedly for increased costs due to a different selection of materials and improvements authorized by the Respondents. Interim Award of Arbitrator (). Appellants timely filed a Motion to Reconsider and Request for Reasoned Award on August 19, 2022. Binding Commercial Arbitration Respondents Motion to Reconsider and Request for Reasoned Award ().

In the Arbitrator's Final Award issued on October 7, 2022, *i.e.*, eighty-three ("83") days prior to the filing of the Petition for Vacatur in the United States District Court on December 29, 2022, in addition to the $152,884.00 award included in the Interim Award of the Arbitrator, the Arbitrator also awarded Respondents $143,525.17 for reasonable attorneys' fees and costs associated with the arbitration. Arbitrator's Final Award (). The Arbitrator's total award to Respondents was $296,409.17 without addressing any of the arguments provided by Appellants in their Motion to Reconsider and Request for Reasoned Award. *Id.* ().

Without determining whether the finished product had directly been copied from and/or bears substantial similarity to Appellants' copyrighted work, a prerequisite according to the Fourth Circuit Court of Appeals, the Arbitrator merely asserted that Respondents had established fair use of the design work as supported by an unprecedented determination that Shelter did not profit from the design and further alleging that sharing of a pdf of the design did not impair the marketability of the design. *Id.* ().

The facts in support of Appellants' Motion for Vacatur, as further used as a basis for the arguments herein are that the Arbitrator imposed deadlines on the Appellants that were neither

identified in the Contracts nor agreed upon by the parties pursuant to the terms of the Contracts. Motion for Vacatur (). Indeed, the Arbitrator admitted in the Arbitrator's Final Award that the Contracts did not contain "specified completion dates." Arbitrator's Final Award (). None of the completion dates identified by the Arbitrator resulted from written change orders signed and dated by all parties as otherwise required by the Contracts. Therefore, the Arbitration award imposed terms on the Appellants that did not have any support in the Contracts being reviewed in the Arbitration.

Additionally, the Arbitrator failed to provide a "reasoned award" as agreed to be the parties with respect to the ten counterclaims asserted by the Appellants. Motion for Vacatur (). Over the course of the meeting the parties had with the Arbitrator in developing the terms to be included in the Report of the Preliminary Hearing and Scheduling Order, they had agreed that the form of the award would be by "reasoned award," which the Arbitrator selected as instead of the remaining two choices—standard award or finding of facts and conclusions of law. Report of Preliminary Hearing and Scheduling Order ().

The Arbitrator also chose to make rulings on parties that he had earlier excluded from the Arbitration proceeding—namely, in particular, Jenny Butler, Bryan Reiss, and Distinctive Design. Arbitrator's Final Award (). The Arbitrator had decided that these parties did not infringe Appellants' copyright in the design plans.

Notwithstanding that it appeared the Arbitrator knew of well-defined, explicit, and clearly applicable controlling law, he perversely misconstrued the law at least with respect to the fair use doctrine in overcoming Appellants counterclaim for copyright infringement based upon the ownership provisions in the Contracts. Motion for Vacatur (). Also, the Arbitrator failed to acknowledge that the Respondents had actually breached the Contract when they refused to pay

the balance due under the Contract when the Contract expressly states that any such failure is a breach of the agreement. *Id.* (). The Highsmiths outright cancelled the work under the Contract even after all materials had been delivered to the Residence, which is otherwise clearly a breach under well-established black letter contract law.

II. PROCEDURAL HISTORY

On December 29, 2022, *i.e.*, within eighty-three ("83") days of when the Arbitrator's Final Award issued, Appellants filed for an order pursuant to the Federal Arbitration Act ("FAA") under 9 U.S.C. § 10 to vacate the Award, in the United States District Court for the District of South Carolina. Petition for Vacatur (). Following the filing of several documents including a motion to dismiss, a memorandum in opposition, a reply brief, a motion for attorneys' fees that was opposed by Appellants, and a petition to confirm, compel, or vacate the arbitration decision followed by Appellants memorandum in opposition, the District Court denied Appellants petition for vacatur through an order and opinion issued on May 19, 2023. Order and Opinion (). Additionally, the Court granted Respondents' application for confirmation of the arbitration award and granted Respondents' motion for attorney fees on June 9, 2023. *Id.* (). Appellants timely filed their notice of appeal to the Fourth Circuit Court of Appeals on July 7, 2023. While the appeal proceeded through to Oral Arguments concerning the issues raised in the appeal, the appellate court eventually ruled that Federal Courts lacked subject-matter jurisdiction to proceed with the case and remanded the case to the District Court. Published Authored Opinion (). The District Court subsequently dismissed the case for the same reason on April 2, 2025. District Court Order of Dismissal ().

Respondents filed their petition for an order confirming the arbitration award with the County of Charleston for the Ninth Judicial Circuit on April 2, 2025, but they had not served Appellants with said Petition. Petition for Order Confirming Arbitration Award (). Inasmuch,

Appellants filed a petition for vacatur of the arbitration award on April 9, 2025 (Ninth Judicial Circuit C.A. No. 2025CP1001965). Respondents notified Appellants via email that Respondents had filed the petition for an order confirming the arbitration award. Appellants then filed their notice and motion for vacatur of the arbitration award in the docketed case ("Motion") on April 9, 2025, i.e., seven ("7") days following the issuance of the United States District Court of South Carolina's order dismissing the federal action altogether on April 2, 2025. Motion for Vacatur (). Respondents submitted the exhibits in support of their petition on April 9, 2025, following which Appellants submitted their answer and affirmative defenses to the Petition on April 28, 2025. Respondents' Answer and Defenses to Amended Petition for Order Confirming Arbitration Award ().

STANDARD OF REVIEW

Questions of law are reviewed de novo. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). "The question of statutory interpretation is one of law for the court to decide." *Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 130, 796 S.E.2d 165, 168 (Ct. App. 2016) (quoting *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 316, 731 S.E.2d 869, 870 (2012)); *see e.g.*, *S.C. DOT v. Revels*, 411 S.C. 1, 8, 766 S.E.2d 700, 704 (2014) (stating that where an issue left to the discretion of a trial court turns on the interpretation of a statute then "the interpretation of the statute is a question of law that the Court reviews de novo"). Thus, the review of the construction of the South Carolina Uniform Arbitration Act, in particular, S.C. Code Ann. § 15-48-30, S.C. Code Ann. § 15-48-50, S.C. Code Ann. § 15-48-130(a), S.C. Code Ann. § 15-48-130(c), is de novo, and "[the appellate court is] free to decide questions of law with no deference to the trial court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009); *Hunt v. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004). Also, "[w]hether a court order is clear and unambiguous is a question of law for

the court." *Campione v. Best*, 435 S.C. 451, 458, 868 S.E.2d 378, 382 (Ct. App. 2021) (citation omitted).

As to findings of fact, however, a circuit court's order "will only be disturbed on appeal if the findings are wholly unsupported by the evidence or controlled by an erroneous application of the law." *Gowdy v. Gibson*, 391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011). "On appeal of an action at law tried without a jury, the findings of fact of the trial court will not be disturbed unless found to be without evidence which reasonably supports the trial court's findings." *Hardaway Concrete Co. v. Hall Contr. Corp.*, 374 S.C. 216, 223, 647 S.E.2d 488, 491 (Ct. App. 2007) (citing *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)).

ARGUMENT

I. THE TRIAL JUDGE ERRED IN RULING THE MOTION TO VACATE OR MODIFY THE ARBITRATOR'S FINAL AWARD WAS NOT TIMELY FILED

The trial judge concluded that Appellants' Motion to Vacate the Arbitrator's Award was untimely for the reason that the application to vacate the arbitration award must be "made within ninety days after delivery of a copy of the award to the applicant …". S.C. Code Ann. § 15-48-130(b). Order Granting Petitioners' Amended Petition for Order Confirming Arbitration Award (). The trial judge's reasoning as a basis for this was that the Award was emailed to the parties on October 7, 2022 and Appellants did not file their motion to vacate with this Court until April 9, 2025. *Id.* (). The trial judge further reasoned that since the only tolling provision under the South Carolina Uniform Arbitration Act is only for "corruption, fraud or other undue means" a tolling provision for the actions that first went on in the Federal District Court and Fourth Circuit Court of Appeals until the action was finally dismissed based upon lack of subject-matter jurisdiction. *Id.* ().

A. Time for Filing a Motion to Vacate Was Tolled Until the State Court Resumed Jurisdiction

The South Carolina Supreme Court has determined that in an instant when an action is removed to federal court, the state court's jurisdiction is suspended or held in abeyance until the case is properly remanded. *Limehouse v. Hulsey*, 404 S.C. 93, 113, 744 S.E.2d 566, 577 (2013). When the state court resumed jurisdiction, it had a duty "to proceed as though no removal had been attempted." *Id.* at 112-113, 744 S.E.2d at 577 (citing *State v. Columbia Ry., Gas & Elec. Co.*, 112 S.C. 528, 537, 100 S.E. 355, 357 (1919)). In adopting this rule, the South Carolina Supreme Court cited a multitude of decisions from other jurisdictions that have adopted the same premise from which it was concluded that "removal of a state court case to federal court tolls the time period for filing responsive pleadings." *Id.* at 113, 744 S.E.2d at 577.

This case has a similar context. Believing that the FAA provided Appellants with the necessary jurisdictional premise to file for a Petition for Vacatur, the Appellants filed a Petition in the United States District Court of South Carolina on December 29, 2022, *i.e.*, within eighty-three ("83") days of when the Arbitrator's Final Award issued. Petition for Vacatur (). The Appellants timely appealed the decision of the district court to the Fourth Circuit Court of Appeals where the case continued through Oral Argument after which the appellate court eventually dismissed the action based upon a more recent Supreme Court decision where it was decided the FAA's look-through approach to jurisdiction did not apply to motions to vacate or confirm. *Badgerow v. Walters*, 596 U.S. 1, 9 (2022). Published Authored Opinion (). The United States District Court of South Carolina vacated its previous decisions and dismissed the action based upon lack of subject-matter jurisdiction in an order issued on April 2, 2025. District Court Order of Dismissal (). Appellants filed their Motion to Vacate the Arbitration Award in the Court of Common Pleas for

the Ninth Circuit on April 9, 2025, i.e., within seven ("7") days following when the action was removed from federal court. Motion for Vacatur ().

Even if the tolling period does not begin until when the Petition to Vacate the Arbitration Award was filed in federal court, in total, Appellants filed their Motion to Vacate the Arbitration Award in state court within the requisite ninety ("90") days required by S.C. Code Ann. § 15-48-130(b).

B. The Ninety Day Limitation Period for Filing a Motion to Vacate in the South Carolina Arbitration Act is Subject to Equitable Tolling

"'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (citing 51 Am. Jur. 2d Limitation of Actions § 169 (2000)). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." *Id.* In addition to statutory tolling mechanisms found in the State Annotated Code, the doctrine of equitable tolling may be applied "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." *Id.* (citing 54 C.J.S. Limitations of Actions § 115 (2005)).

"Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Id.* (citing *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009)). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness." *Id.* (citing *Rodriguez* at 736 (citation omitted)).

It has been observed that "[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116,

687 S.E.2d at 32 (citing *Ocana v. Am. Furniture Co.*, 2004 NMSC 18, 135 N.M. 539, 91 P.3d 58, 66 (N.M. 2004)). However, jurisdictions have considered tolling in a variety of contexts and have developed differing parameters for its application. *Id.* at 116, 687 S.E.2d at 32-3 (citing *Irby v. Fairbanks Gold Mining, Inc.*, 203 P.3d 1138, 1143 (Alaska 2009) ("Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies.")). "[T]he doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits." *Id.* at 116, 687 S.E.2d at 33 (quoting *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988)).

Similar to the South Carolina Supreme Court's explanation in *Hooper*, it appeared that Appellants had more than one legal remedy available—either under the FAA or South Carolina Arbitration Act ("SCAA"), S.C. Code Ann. § 15-48-10 *et seq.* Appellants proceeded with the Petition for Vacatur under the FAA in federal court. The Fourth Circuit Cout of Appeals eventually dismissed the Petition for Vacatur based upon lack of subject-matter jurisdiction due to a recent United States Supreme Court decision, and Appellants proceeded with filing a Motion for Vacatur under the SCAA. The time spent in federal district court and the Fourth Circuit Court of Appeals should be subject to equitable tolling given the South Carolina Supreme Court's position taken in *Hooper*. See, also, *Kimmer v. Wright*, 396 S.C. 53, 62 719 S.E.2d 265, 270 (Ct. App. 2011); *Ross v. Ross*, 394 S.C. 261, 264-65 715 S.E.2d 359, 360-61 (Ct. App. 2011); *Magnolia North Property Owners Assoc., Inc. v. Heritage Comm., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012).

C. The Trial Judge's Error in Determining Appellants Did Not Timely File the Motion for Vacatur of the Arbitration Award is Reason Alone for Reversing the Trial Court's Order

The trial judge's ruling that Appellants did not timely file the motion for vacatur should be reversed either for the reason that the time period was tolled until the state court's jurisdiction had been reestablished upon final dismissal of the litigation in federal court or for the reason that equitable tolling should be applied based upon Appellants' pursuit of vacatur at the federal level based upon the FAA.

II. THE TRIAL JUDGE ERRED IN FAILING TO FIND THE ARBITRATOR EXCEEDED HIS POWERS

The South Carolina Supreme Court has ruled that an arbitrator exceeds his powers when "the issue resolved by them is not within the scope of the agreement to arbitrate." *Pittman Mortgage Company, Inc. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 338 (1997). The South Carolina Supreme Court has also determined that an arbitrator exceeds his powers when he imposes his own policy choice *Waldo v. Cousins*, 442 S.C. 662, 668, 901 S.E.2d 276 (2024) (citing *Stolt-Nielsen S.A v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676–77, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)). As further discussed in the sections that follow, when the Arbitrator imposed contract deadlines that were not at all supported by the contracts and he failed to provide a reasoned award contrary to the agreement of the parties and the AAA rules of commercial arbitration, which he was obligated to follow pursuant to the Contract provisions, constitutes the Arbitrator exceeding his powers as proscribed by S.C. Code Ann. § 15-48-130(a)(3).

A. The Trial Judge Erred in Failing to Find that the Contract Deadlines Imposed by the Arbitrator were Beyond the Scope of the Contracts

In the Arbitrator's Final Award, the Arbitrator expressly admits that "the contracts did not contain specified completion dates." Arbitrator's Final Award (). Furthermore, in order to add completion dates to the Contracts or make any amendments to the Contracts at all, the Contracts

include a provision that stated "[a]ll changes to the contract shall be reflected by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price." Contract to Provide His-and-Hers Master Closets (). However, the Arbitrator was not in possession of any such change orders because no such change orders were ever executed. Rather, the Arbitrator used completion dates communicated by Design Gaps as his basis for the completion dates that he chose to impose on Appellants, notwithstanding those completion dates would have the required written change orders as specified in the Contracts.

Imposing completion dates as required deliverables under the contracts by the Arbitrator goes beyond what Appellants bargained for with respect to the agreements and any resolution of disputes with respect to these agreements. The Fourth Circuit Court of Appeals has rigidly maintained that the arbitrary addition of deadlines to contracts that are not in any way supported by the contracts is a valid basis for vacating the arbitration awards. See, *e.g.*, *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006) ("the arbitrator disregarded the plain and unambiguous language of the governing arbitration agreement when he concluded that it included an implied one-year limitations period. In so doing, the arbitrator acted in manifest disregard of the law and failed to draw his award from the essence of the agreement.").

An uncontrolled decision by the Arbitration to impose completion dates that is not vacated according to the provisions of S.C. Code Ann. § 15-48-130(a) results in the achievement of a legal end that is a lawless one. See *Waldo* at 668-69. These impositions of arbitrary contractual deadlines by the Arbitrator that did not have any support from the Contracts demonstrate that the Arbitration award failed to draw it essence from the Contracts. Inasmuch, the trial judge erred in failing to rule the Arbitrator's resolution of this matter was via whim through the enforcement of deadlines that were not based upon the terms of the contracts.

B. The Trial Judge Erred in Finding the Arbitrator Issued a Reasoned Award as Required by the Agreement Between the Parties and the AAA Rules of Commercial Arbitration

According to South Carolina precedent, arbitrators need not specify their reasoning or the basis of the award as long as the factual inferences and legal conclusions supporting the award are "barely colorable." *Pittman Mortgage* at 77, 488 S.E.2d at 338. The contracts provide and the parties had settled upon the use of the Commercial Arbitration Rules of the American Arbitration Association ("AAA") to resolve any dispute that arises under the contract. The AAA rules provide the "architectural detail" to "furnish a set of procedure for how the arbitration should go." *Hicks Unlimited, Inc. v. Unifirst Corp.*, 439 S.C. 623, 630, 889 S.E.2d 564, 567 (2023).

According to the AAA Commercial Arbitration Rules in effect at the time of the arbitration, a preliminary hearing was conducted where the parties discussed with the arbitrator and "establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute." Commercial Arbitration Rules and Mediation Procedures, R-21(b) (American Arbitration Association 2013). While, according to the AAA Commercial Arbitration Rules, "the arbitrator need not enter a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." *Id.* at R-46(b). During the preliminary hearing, the parties discussed that the form of the award should be a reasoned award. The Arbitrator circled "Reasoned Award" in the Scheduling Order under the section entitled "Form of Award." Report of Preliminary Hearing and Scheduling Order (). This provided the indication that the Arbitrator determined that a reasoned award was appropriate.

1. Form of Reasoned Award

While the term "reasoned award" has not been defined in the Federal Arbitration Act where this term appears, a host of several Circuit Courts have adopted a standard that (i) decides if a

reasoned award has been agreed upon by the parties, (ii) identifies the issues addressed within the arbitrator's award that are subject to a reasoned award, (iii) imposes requirements to meet the reasoned award standard in an arbitration award, and (iv) when the failure of an arbitration award to arise to the level needed to meet the reasoned award standard constitutes vacatur. See, e.g., *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 473 (5th Cir. 2012). The Second Circuit agrees with a standard that appears to be evolving into an accepted definition of reasoned award as "something short of findings and conclusions but more than a simple result." *Leeward Constr. Co. v. Am. Univ. of Antigua - College of Med.*, 826 F.3d 634, 640 (2d Cir 2016) (quoting *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 843 (11th Cir. 2011)).

The *Leeward Constr.* decision has been adopted in four other Second Circuit Court of Appeals cases. See *Tully Constr. Co. v. Canam Steel Corp.*, 684 Fed. Appx. 24 (2d Cir. 2017); *Bergheim v. Sirona Dental Sys.*, 711 Fed. Appx. 43 (2d Cir. 2017); *Commodities & Minerals Enter. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802 (2d Cir. 2022); *Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co.*, 57 F.4th 372 (2d Cir. 2023). The Third Circuit has also adopted the Second Circuit's reasoning in *Leeward Constr*. and, using the same language adopted by the Second Circuit, provided that "a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." *Sabre GLBL, Inc. v. Shan*, 779 Fed. Appx. 843, 855 (3d Cir. 2019) (quoting *Leeward Constr.*, 826 F.3d at 640). In addition to Appellate Court adoption, approximately forty district courts in New York have applied the *Leeward Constr.* definition, while district courts in New Jersey (Third Circuit), Mississippi and Texas (Fifth Circuit), Ohio (Sixth Circuit), Minnesota (Eighth Circuit), and Arizona and Idaho (Ninth Circuit) have applied the Second Circuit's decision without controversy.

Given the widespread adoption of the *Leeward Constr.* definition that a reasoned award is "something short of findings and conclusions but more than a simple result," Appellants argue, as they did before the trial judge, that it is appropriate for this Court to adopt that definition of reasoned award in its review of the Arbitrators' Final Award. Respondents Memorandum in Support of Respondents' Motion for Vacatur ().

2. Appellants' Ten Counterclaims Should Have Been Subject to a Reasoned Award

In the Interim and Final Award of the Arbitrator, the Arbitrator's bases for denying Appellants' ten counterclaims includes "Respondents did not prove any false or reckless representation made by Claimants which caused it any damage;" "Respondents did not establish any tortious interference in its contract by any party;" "… did not establish that there was a civil conspiracy between and among the Claimants, Distinctive Design or any other party;" "Respondents did not establish that Claimants' conduct was unfair or deceptive;" "Respondents did not establish that the conduct it complains of was repetitive or in violation of any public interest;" "since the parties entered a written contract, there can be no 'quasi' contract;" and "Respondents gave to the Claimants their drawings for the cabinets … Claimants were free to use the drawings to measure the compliance of Design Gaps with these drawings and its obligation to install the designed cabinets in accordance with its contractual obligation." Arbitrator's Final Award (). According to the guidance provided by *Leeward Constr.*, a decision needs to made concerning whether the issues to be decided upon are the central issue or issues raised before the arbitrator before a reasoned award is made. *Leeward Constr.*, 826 F.3d at 640. Appellants defenses directly addressed the central claims identified by the Respondents, Hence, under the guidance provided in *Leeward Constr.*, Appellants' defenses should have been subject to a determination using a reasoned award. Binding Commercial Arbitration Respondents' Counterclaims ().

Additionally, in the Arbitrator's Interim Order, the Arbitrator determined that the amended claims of negligence, material breach of contract, fraudulent misrepresentation, failure to mitigate damages, tortious interference, civil conspiracy, unfair and deceptive trade practices, violation of the copyright act, and conversion "shall be allowed and are deemed to be arbitrable under the arbitration agreement between the parties." Interim Award of Arbitrator (). Pursuant to the reasoning provided in *Leeward Constr.*, the counterclaims were identified by the Arbitrator as issues raised before the Arbitrator and are subject to a reasoned award. *Leeward Constr.*, 826 F.3d at 640.

Given that Appellants defenses and counterclaims are subject to a decision using a reasoned award, based upon the guidance provided in *Leeward Constr.*, the Second Circuit provided that such central issues and issues raised before the arbitrator in the arbitration do not require "a detailed rationale for each and every line of damages awarded," but it does need to "set forth the relevant facts, as well as the key factual findings supporting its conclusions." *Id*. A "reasoned award" requires "something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel." *Id*.

3. The Trial Judge Erred in Failing to Determine that the Arbitrator Did Not Provide a Reasoned Award and Exceeded His Powers

The arbitration award has merely provided a decision on the issues and claims before the Arbitrator, but without providing the relevant facts and factual findings supporting the apparent conclusion that the Appellants' arguments against those issues and claims were not applicable. Even while the Arbitrator decided Appellants' counterclaims were issues to be considered, the arbitration award does not arise to the level of reasoned award provided by the Second Circuit in *Leeward Constr*. with the award's failure to set forth the relevant facts and the key factual findings supporting the Arbitrator's conclusions. *I.e.*, for the most part, the Arbitrator's arguments against

the counterclaims do not provide "something more than a line or two of unexplained conclusions," which according to the evidence submitted is not what the Arbitrator provided. By Appellants count, the Arbitrator dismissed Appellants' ten counterclaims using just less than twelve lines of text in his Final Award. Arbitrator's Final Award ().

"Arbitration rests on consent of the parties, where parties freely exchange the expansive litigation rights court actions provide for the speed, informality, and finality arbitration promises." *Waldo* 442 S.C. at 668 ("when parties calculate the benefits and risks of their exchange, they do not bargain to have their disputes resolved by whim"). An arbitrator that imposes his own policy choice that is contrary to the agreement of the parties exceeds his powers under S.C. Code Ann. § 15-48-130(a)(3). *Waldo* at 669. The Arbitrator's failure to provide a reasoned award pursuant to the agreement reached between the parties constitutes a basis for the Arbitration Award to be vacated. S.C. Code Ann. § 15-48-130(a)(3).

III. THE TRIAL JUDGE ERRED IN FINDING THAT THE ARBITRATOR DID NOT REFUSE TO HEAR EVIDENCE TO THE CONTROVERSEY AND DID NOT CONDUCT THE HEARING ON THE MERITS IN SUCH A WAY TO PREVENT SUBSTANTIAL PREJUDICE TO APPELLANTS' RIGHTS

An arbitrator's refusal to hear evidence material to the controversy or otherwise so conducts the hearing, contrary to the provisions of S.C. Code Ann. § 15-48-50, as to prejudice substantially the rights of a party warrants vacatur of the award. S.C. Code Ann. § 15-48-130(a)(4). In pertinent part, each of the parties are entitled to be heard and to present evidence material to the controversy. S.C. Code Ann. § 15-48-50(b).

"Arbitration is a matter of contract and controlled by contract law." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citing 5 Am.Jur.2d Arbitration and Award § 11 (1962)). "To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the

scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir.1988)). "[A]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967))

The Arbitrator chose to make rulings on parties in the merits hearing that the Arbitrator had earlier excluded from the Arbitration proceeding resulting in substantial prejudice to the rights of Appellants to present such evidence at the Arbitration proceeding against these parties that were earlier excluded by the Arbitrator. Appellant had requested that Jenny Butler, Bryan Reiss, and Distinctive Designs, LLC be added as third-party respondents to the Arbitration. The Arbitrator made an Interim Ruling on April 20, 2022, denying the entry of Distinctive Design, Bryan Reiss, and Jenny Butler as third-party respondents in the Arbitration. Interim Order on Motion to Join Third Party Respondents (). Therefore, based upon the Arbitrator's Order, Distinctive Design, Bryan Reiss, and Jenny Butler were non-parties to the Arbitration. However, the Arbitrator included rulings in the Final Award finding Bryan Reiss working on behalf of Distinctive Design did not infringe Appellants' Copyright Works. Arbitrator's Final Order (). Such a finding against direct copyright infringement would have prevented finding of vicarious copyright infringement against Jenny Butler even though she had provided the Copyrighted designs to Bryan Reiss. eMail Jenny Butler Providing Drawings to Bryan Reiss ().

Appellants did not have a full and fair opportunity to litigate the direct and vicarious copyright infringement claims against Bryan Reiss, Distinctive Design, and Jenny Butler since the

Arbitrator had ordered that they not be named in the Arbitration as third-party respondents. A certificate of registration issued by the Copyright Office is "*prima faci*e evidence of the validity of the copyright and of the facts stated in the certificate," such as ownership. *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 428 (4th Cir. 2010) (citing 17 U.S.C. § 410(c)). The Respondents argued that the Arbitrator should not consider this as evidence in his Final Award. Notwithstanding that the Respondents did not want the Arbitrator to consider the registration as evidence, it did exist, and it was provided to the Arbitrator as part of the Arbitration record. Email to Arbitrator Providing Copyright Registration (). Once the certificate is shown to exist, the burden shifts to the defendant to prove that the claimed copyrights are invalid. *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 434 (4th Cir. 1986). The Arbitrator capitulated to the request of the Respondents and ruled that the Appellants "failed to enter into evidence a valid copyright registration." Arbitrator's Final Award ().

Without a determination that the Copyrighted work is valid, as shown by Appellants' certificate of registration, the Arbitrator chose not to consider Bryan Reiss' access to the Copyrighted work and the substantial similarities of the work in his determination of whether there had been copyright infringement. *Bldg. Graphics, Inc. v. Lennar Corp.*, 708 F.3d 573, 577 (4th Cir. 2013) ("A copyright infringement claim … requires a showing that the defendant copied the plaintiff's work and that the defendant's work is 'substantially similar' to the protectable elements of the plaintiff's work. Because direct evidence of copying is hard to come by … a plaintiff may establish an inference of copying by showing access to the allegedly infringed work as well as substantial similarity between the works at issue.")

The Arbitrator chose to rule against finding copyright infringement by Bryan Reiss even though, through his own Interim Order, Bryan Reiss was not considered by the Arbitrator to be a

respondent to this action. This ruling came notwithstanding that a finding of the email exchange of the Copyrighted designs had been made and there was substantial similarity between what Bryan Reiss had performed and what the Copyrighted designs showed. Arbitrator's Final Award (). While the Arbitrator admitted to the similarities between the Copyrighted designs and the installation performed by Bryan Reiss, he indicated that the resemblance was necessary "due to the limitations of the space and the client's desired layout" notwithstanding there was no precedential basis provided by the Respondents to support this defense in avoiding a finding of Copyright Infringement. The Arbitrator did not allow the differences between aesthetic copyrighted elements and functional elements to be considered with respect to Bryan Reiss' copyright infringement. See *Ashley Furniture Indus. v. Sangiacomo N.A.*, 187 F.3d 363 (4th Cir. 1999). Also, as the Arbitrator stated, Bryan Reiss implemented the "client's desired layout," which was reflected in the Copyrighted design provided by Appellants, but the Arbitrator chose not to allow for a reduction in the award based upon Appellants' alleged purchase and ownership of the Copyrighted design. Arbitrator's Final Award ().

Finally, the Arbitrator chose to relieve Bryan Reiss and Distinctive Design of any copyright infringement liability by applying a fair use defense. However, fair use is generally reserved for criticism, comment, news reporting, teaching, scholarship, or research, none of which are applicable here. *Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301, 308 (4th Cir. 2010). Respondents' and Bryan Reiss' use of Appellants' Copyrighted works was willful and commercial in nature. Respondents' and Bryan Reiss' use of Appellants' Copyrighted works encompassed the entire use of the aesthetic elements of Appellants' plans. Any changes were functional in nature, which were non-transformative of the plans. Had Bryan Reiss, Distinctive Design, and Jenny Butler been named as third-party respondents to the Arbitration, then Appellants would have had

the opportunity to raise these arguments to the Arbitrator.

The Arbitrator's refusal to admit Distinctive Design, Bryan Reiss, and Jenny Butler as third-party respondents in the arbitration prevented Appellants from presenting evidence that the Arbitrator, based upon his Interim and Final Awards ended up making material to the controversy. See, *e.g.*, *North Greenville College v. Sherman Construction Co., Inc.*, 270 S.C. 553, 243 S.E.2d 441 (1978) ("the trial court erred in refusing to permit counsel to cross-examine the Piedmont witnesses on the prior arbitration or to introduce documentary evidence of the proceedings") The Arbitrator chose to conduct the hearing contrary to the provisions of S.C. Code Ann. § 15-48-50 resulting in substantial prejudice to the rights of Appellants to try the case through cross-examining witnesses. Therefore, the award should be vacated pursuant to S.C. Code Ann. § 15-48-130(a)(4).

IV. THE TRIAL JUDGE ERRED IN FINDING THE ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW

An arbitrator is considered to have manifestly disregarded or perversely misconstrued the law governing the dispute, when the arbitrator fails to follow controlling law and the arbitrator knew of well-defined, explicit, and clearly applicable controlling law, yet still refused to apply it. *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013); *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). The standard is met when the award is the product of an intentional or reckless flouting of the law, and not a mere error in interpreting it. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323.

The stated approach in determining whether there has been a manifest disregard of the law is considered to complement the rule that the form of the award need not necessarily be accompanied by any reasons as long as the award can be reconciled with factual inferences and legal conclusions that are at least "barely colorable." *Trident Technical College v. Lucas & Stubbs, Ltd.,* 286 S.C. 98, 111, 333 S.E.2d 781, 789 (1985) (quoting *In the Matter of Andros Compania*

Maritima, S.A. and Marc Rich & Co., A.G., 579 F.2d 691, 704 (2d. Cir. 1978)).

A. Arbitrator's Application of the Fair Use Doctrine to Overcome Copyright Infringement Constitutes Both a Manifest Disregard of the Law and the Arbitrator Exceeding His Powers

1. Arbitrator's Application of the Fair Use Doctrine to Overcome Copyright Infringement is a Reckless Disregard of Well-Established Statutory and Judicial Precedent Concerning the Legal Principal

Design Gaps registered the cabinet and closet systems drawings representing the architectural works used at Respondent Highsmiths' Residence under Registration Number VAu001462768 with the United States Copyright Office. Email to Arbitrator Providing Copyright Registration ().

The Respondent Highsmiths argued that they were involved in the design of the cabinet and closet systems but did not provide evidence of authorship of any original work they contributed to the cabinet and closet system. They further argued that since they were provided with copies of the designs that did not indicate copyright ownership, they had a good faith belief that they had rights to use the design. Kacie Highsmith Deposition (). However, the front page of each of the Contracts indicated that "[a]ll designs created remain the sole property of Design Gaps, Inc. and may not be reproduced in whole or in part without the written consent of Design Gaps, Inc." Contract to Provide His-and-Her Master Closets (). Respondent Highsmiths were aware of who provided the design and who put the design together. It is not mandatory that the work be registered at the time of publication of the work. But, in this case, the copyright owners subsequently registered the work with the United States Copyright Office.

Contrary to Respondent Highsmiths' arguments, the designs provide more than measurement information, they provide architectural drawings showing the overall form as well as the arrangement and composition of spaces and elements in the design. Such elements, according to the Copyright Laws of the United States, are subject to copyright protection.

As Respondent Highsmiths' acknowledge, the statutory requirements used in determining whether the doctrine of fair use applies are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir 2003) (quoting 17 U.S.C. § 107). The fair use doctrine is to prevent a finding of copyright infringement "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 202 (4th Cir 1998). None of these exceptions are applicable to the use intended by Shelter, Respondent Highsmiths, Distinctive Design or Bryan Reiss.

Shelter and, upon information and belief, at the direction of Respondent Highsmiths admit that their use was "merely" providing a PDF of the copyrighted works to Distinctive Design alluding that there was no copyright infringement. Generally, copyright infringement is a strict liability offense, in which a violation does not require a culpable state of mind. However, "knowledge of, or willful blindness to, specific instances of infringement" supports a finding of contributory infringement. Respondents' willful blindness to the fact that the Appellants possessed copyright protection in the architectural works is itself an infringement of Appellants' rights.

Bryan Reiss, the owner of Distinctive Design, admitted that what was installed in the field was like the closet designs. Bryan Reiss Deposition (). There were only minor changes to the elevation from the floor plan that was provided by Design Gaps. Indeed, Respondent Highsmiths admit that their use was not at all transformative in any way. Kacie Highsmith Deposition (). Indeed, the Supreme Court has determined that a "transformative" use "adds something new, with

a further purpose or different character, altering the first with new expression, meaning, or message," none of which are applicable here. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994). Certainly, the arbitrator did not consider the transformative nature of Respondent Highsmiths' use when determining their use was subject to the fair use doctrine.

If a use is not transformative, then there must be a showing that the second and third factors weigh in favor of fair use. In assessing the second factor, courts must determine the "thickness" or "thinness" of the author's exclusive rights. *Brammer v. Violent Hues Productions, LLC*, 922 F.3d 255, 266 (4th Cir. 2019). The thickness of the rights in visual materials, where architectural works are embodied, typically turn on the extent of creative choices embodied in the work. *Id.* (quoting *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1120-21 (9th Cir. 2018)). The Arbitrator failed to provide such a reasoned assessment in determining that Respondent Highsmiths' use was subject to the fair use doctrine. The third factor addresses whether "no more was taken than necessary" to accomplish the user's purpose. *Id.* at 267-68 (citing *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014)). In the instant situation, all aspects of the architectural design were taken to accomplish Respondent Highsmiths' purpose. But, again, the Arbitrator did not address this in a reasoned assessment in his determination that Respondent Highsmiths' use was subject to the fair use doctrine.

With respect to the fourth factor, a showing that the architectural work is more than minimally commercial especially without a finding that the use is not transformative in nature, the use that exists in this instance, supports a finding that the potential mark for the value of the copyrighted work is affected. *Bouchat v. Baltimore Ravens Ltd. P'ship*, 737 F.3d 932, 936 (4th Cir 2013). Clearly, each of the factors of the statutory test as further defined by court precedent for fair

use fails to support a finding of fair use, and the Arbitrator has ignored this well-established legal principle in finding that Respondent Highsmiths' infringing use is subject to the fair use doctrine.

The Arbitrator's resume indicates that he has been practicing law in the South Carolina since 1976 and is experience includes the representation of "contractors and architects in arbitration proceedings[; arbitration of] disputes involving owners, architect, general contractors, subcontractors and contractors[; and mediation of] medical facilities, suppliers, asbestos, property damage and mechanical disputes." Arbitrator's Biography (). Therefore, these types of clients and arbitrations over the course of well over 45 years likely involved copyright infringement matters. Additionally, the materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator either was aware of or had access to attorneys who have knowledge of Copyright Law, and the Arbitrator willfully flouted the governing law by refusing to apply it. Therefore, the Arbitrator has manifestly disregarded this clearly defined legal principle in Copyright Law that is not subject to reasonable debate.

2. The Wrongful Application of the Fair Use Defense by the Arbitrator Also Resulted in the Arbitrator Exceeding His Powers

The front page of the Contracts toward the top of the agreements includes the following expression:

> "ALL DESIGNS CREATED REMAIN THE SOLE PROPERTY OF DESIGN GAPS, INC. AND MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE EXPRESS WRITTEN CONSENT OF DESIGN GAPS, INC."

Improper application of the fair use defense by the Arbitrator resulted in this clause in the agreements from becoming moot and inapplicable otherwise allowing Respondents to use Appellants' copyrighted design even transferring these to another contractor to implement these designs. Allowed use of these plans that Appellants developed goes beyond what they intended to contract for with the parties.

In addition to coordinating the acquisition of materials and installation of these materials in residences, such successful installations require the design of these final installations in the residence and become very march a part of the deliverables under the contracts that Appellants' enter into with purchasers. The mere taking of these designs without their purchase deprives Appellants of the benefit that such ownership confers upon them. The Arbitrator allowed an inapplicable defense to preclude Appellants from enforcing this clause in the agreements resulting in the Arbitrator exceeding his powers since such a ruling deprived Appellants of the benefits of this clause within the agreements that they entered into with the Respondents.

3. Arbitrator's Manifest Disregard of the Law and the Arbitrator Exceeding His Powers Under § 15-48-130(a)(3) Both Justify Vacating the Arbitrator's Final Award

At the urging of counsel for Respondents, notwithstanding the rather weak and tenuous precedential support that existed for the fair use defense, the Arbitrator adopted this defense to overcome the contractual rights that Appellants had in the copyright to the plans that Appellants had developed. So, not only did the Arbitrator's decision constitute a manifest disregard of the law, it resulted in the Arbitrator exceeding his powers with respect to the design ownership clause in the Contracts. Not only should the Arbitrator's Final Award be vacated based upon the Arbitrator's manifest disregard of the law, it should also be vacated pursuant to S.C. Code Ann. § 15-48-130(a)(3) since the Arbitrator adopted a provision to overcome a right that the Appellants had that was theirs pursuant to the Contracts they had with Respondents. The trial judge erred in failing to recognize the Arbitrator's manifest disregard of the law and the Arbitrator exceeding his powers through the wrongful adoption of the fair use defenses to overcome Appellants' copyright infringement counterclaim that was otherwise supported by the Contracts.

B. Arbitrator's Refusal to Acknowledge that Appellants Materially Performed Under the Terms of the Contracts and Respondents Breached the Contracts Demonstrates the Arbitrator Failed to Follow Well-Established Black Letter Law of Contracts

Design Gaps had entered the Contracts with Respondent Highsmiths for cabinetry at the Residence that totaled $332,236.94. Respondent Highsmiths only paid $264,935.77 to Design Gaps leaving them with a balance of $55,588.94 for cabinetry and materials and a balance for final installation in the amount of $11,712.23 or a total amount owed to Design Gaps in the amount of $67,301.17. Arbitrator's Final Award ().

Appellant David Glover received emails from Andrew Walden, counsel for Respondent Highsmiths around May 14, 2021, terminating Design Gaps access to the Residence. Petition for Vacatur (). The Contracts did not include any provision concerning completion date for the materials to be delivered and work to be performed. Appellants had ordered all materials and had a contractor on site to complete installation of same. *Id.* (). Therefore, Appellants substantially performed in good faith the provision of the materials as they were proceeding to installation under the Contracts whereby such purchases were in compliance with the Contracts. Rather, it was Respondent Highsmiths that decided they wanted to upgrade the materials over those specified in the Contracts and they breached the Contracts with Appellants so that they could engage Distinctive Design to use the layout provided by Design Gaps but provide what Respondent Highsmiths considered were high quality materials. *Id.* (). Furthermore, the Contracts provided that the right of possession to, and ownership of all goods and merchandise furnished under the Contracts remains the property of Design Gaps until all payments required to be made under the Contracts is made by the Buyer. Contract to Provide His-and-Her Closets ().

It is a well-established premise of South Carolina law that if subsequent to the execution of the contract, the purchaser breaches the contract, the seller shall have the right to declare this

contract null and void and retain from the earnest money its actual damages caused by purchaser but shall not be precluded from pursuing any other rights the seller might have at law or in equity. *Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (1984) (citing Richard R. Powell & Patrick J. Rohan, 6A *Powell on Real Property: Vendors and Purchasers*, P 882[2] at 81-223 (1995)). Indeed, the Supreme Court has stated that it is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties, but it is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract. *Salve Regina College v. Russell*, 499 U.S. 225, 229, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991).

Respondent Highsmiths' failure to pay the Contracts in full to Appellants, according to the terms of the Contracts resulted in a material breach of the Contracts by Respondent Highsmiths. Pursuant to well-settled South Carolina law, Appellants as sellers were left with the right to declare the Contracts null and void and retain from the earnest money its actual damages caused by Respondent Highsmiths' breach. The Arbitrator failed to consider and provide a reasoned assessment that the refusal of Respondent Highsmiths' to continue to pay Design Gaps was itself a breach that would have allowed Appellants to declare the Contracts null and void and retain from the earnest money their actual damage caused by Respondent Highsmiths' breach. Furthermore, the Arbitrator failed to consider that on January 14, 2021, the Respondent Highsmiths transferred their interest in the Residence to the Kacie M Highsmith Trust dated December 18th, 2020. Respondent Kacie Highsmith was the Trustee of the said Trust. With Respondent Highsmiths loss in ownership of the Residence, their standing to even bring the arbitration was called into question by Appellants. However, the Arbitrator chose not to even make a reasoned assessment on this rule of law.

The materials and pleadings filed by the parties fully informed the Arbitrator of the applicable law in the matters to be considered. The Arbitrator admits that he is aware of or had access to attorneys who have knowledge of construction contracts & procurement law, and the Arbitrator willfully flouted the governing law by refusing to apply it. Arbitrator's Biography (). This is a well-established principle that is clearly defined and not subject to reasonable debate, and the Arbitrator's refusal to heed that legal principle in construction contracts & procurement law demonstrates a manifest disregard of the law.

C. Trial Judge Erred in Failing to Find the Arbitrator's Manifest Disregard of the Law Justifies Vacating the Final Award

Based upon the arguments included in this section, the Arbitrator's use of the fair use doctrine to overcome Appellants' ownership provisions in the designs based upon the Contracts and the finding that Appellants and not Respondents breached the contracts was a manifest disregard of the law. In at least one instance, these errors also present overtones of the Arbitrator making rulings in the Final Award that wrongfully adapt the Contracts to favor Respondents. The trial judge errored in refusing to vacate the Final Award based upon the Arbitrator's manifest disregard of the law and application of these wrongly adopted bases of ruling in favor of the Respondents to change the Contracts that had been agreed upon by the parties.

V. THE TRIAL JUDGE ERRED IN GRANTING RESPONDENTS' PETITION TO CONFIRM THE ARBITRATOR'S FINAL AWARD AND FAILING TO INSTEAD VACATE THE ARBITRATOR'S FINAL AWARD

As argued herein, law and precedent support a finding that Appellant's timely filed their motion to vacate the Arbitrator's Final Award; the Arbitrator exceeded his powers when imposing contract deadlines that went beyond the scope of the agreement, failed to issue a reasoned award based upon his findings pursuant to the AAA Commercial Arbitration Rules, and imposed a fair use defense that cancelled design ownership provision in the Contracts that gave Appellants'

ownership rights in the designs they created; the Arbitrator made an interim order and decisions during the merits hearing that created a condition that prevented Appellants from presenting certain evidence to the Arbitrator and failed to conduct the hearing on the merits in such a way to prevent substantial prejudice to Appellants' rights; the Arbitrator manifestly disregarded the law in applying the fair use defense to Appellants copyright infringement counterclaim and failing to determine that Respondents had breached the contract.

CONCLUSION

For all the foregoing reasons, this Court should reverse the trial judge's grant of Respondents' Petition to Confirm the Arbitrator's Final Award and overturn the trial judge's decision that the Arbitrator's Final Award should not be vacated.

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By:_____

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