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 REPLY BRIEF OF APPELLANTS

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I. RESPONDENTS' REPRESENTATION THAT APPELLANTS DID NOT PRESENT THEIR TOLLING ARGUMENTS TO THE TRIAL COURT IS UNSUPPORTED BY THE INFORMATION PROVIDED IN THE MOTION FOR VACATUR AND THE ARGUMENTS PRESENTED AT THE TRIAL COURT

Respondents argue that Appellants' tolling arguments are not preserved for appeal and should not be allowed to be raised on appeal. Respondents' Initial Brief, pp. 7-9 (February 20, 2026). However, anything that has been properly argued through and ruled upon by the trial court is preserved for appeal. Cf *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 34, 410 S.E.2d 21, 25 (Ct.App.1991) (citing *Mackey v. Kerr-McGee Chemical Co.*, 280 S.C. 265, 312 S.E.2d 565 (Ct.App.1984)).

In the instant situation, Respondents did not raise the issue concerning whether the filing of Appellants' motion to vacate was untimely and not subject to tolling until they filed their Memorandum in Support of Amended Petition for Order Confirming Arbitration Award later in the day on August 28, 2025, the day when briefs in advance of the hearing scheduled for September 4, 2025, were due. However, Appellants' did choose to argue in support of tolling during the hearing before the Court. Counsel for Appellants' stated to the Court that the Petition for Vacatur had been filed with the Federal District Court within 90 days, which should have tolled the period until the action was either decided upon or dismissed. As indicated to the Court, the Federal District Court subsequently dismissed the Petition and even counting those days up to the filing of the Motion for Vacatur in the Trial Court, Appellants were still within the 90-day period. Transcript of Proceedings (). Additionally, Appellants addressed the timing issues in their Motion for Vacatur whereby they indicated the following:

> This action was first brought in the United States District Court for the District of South Carolina, Charleston Division on December 29, 2022, which was within 90 days of receipt of the arbitration award, and was eventually dismissed on April 2, 2025, for lack of subject matter jurisdiction. The refiling of this application for vacatur on April 9, 2025, with the

> South Carolina State Court having venue, considering the tolling of the time the action was in Federal Court, still falls within the requisite 90-day period.

Motion for Vacatur ().

Appellants did argue in favor of the timeliness of the filing of their motion for vacatur in both the Motion for Vacatur and the arguments they presented to the Court and the Court subsequently ruled against the tolling provision. Therefore, contrary to the position taken by the Respondents in their Initial Brief, the issue is properly preserved and presented for appeal before this Court.

Based upon 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.* See *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)). 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).

II. THE BREACH OF CONTRACT CLAIMS WITH RESPECT TO THE ADDITION OF COMPLETION DEADLINES WERE OUTSIDE THE SCOPE OF THE AGREEMENTS BY THE PARTIES IN THE CONTRACTS

Respondents maintain that the breach of contract claims raised by Respondents in the

Arbitration "arose out of or in connection with" and bore a "significant relationship" to the Contracts and were well-within the Arbitrator's power to decide. Citing *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001)). However, the court in *Gissell* indicated that the "significant relationship" test only applies to "broadly-worded arbitration agreements." South Carolina courts have made it clear that the "broadly-worded arbitration" phrase relates to a "broadly worded arbitration clause" that applies to disputes that do not arise under the contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Zabinski*, 346 S.C. at 598, 553 S.E.2d 110 (citing *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001)). The *Zabinski* Court maintained that "[d]espite South Carolina's presumption in favor of arbitration," a significant relationship does not exist between the claims and whether they can be brought under the agreement. At the time of this decision in *Zabinski*, the Fourth Circuit endorsed using the significant relationship test employed in *American Recovery*. *Long*, 248 F.3d at 316. Even while such disputes do have a significant relationship to the consulting agreement, claims that implicate the terms of the consulting agreement still must be decided accordingly. *American Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88 (4th Cir.1996). As mentioned in the Initial Brief of Appellants, the Fourth Circuit 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."). Therefore, the

significant relationship that the Arbitrator-imposed deadlines have relative to the Contracts is not the issue here. Rather it is whether such Arbitrator imposed deadlines are supported by the Contracts or not.

First, as expressly admitted by the Arbitrator, the Contracts do not contain "specified completion dates." Arbitrator's Final Award (). Furthermore, the Contracts required that "[a]ll changes to the contract shall be reflected in by written change orders signed and dated by all parties and specifically stating the changes and increase or decrease in contract price." () However, there were no change orders in the contract that were executed pursuant to these terms. Accordingly, the arbitrary addition of deadlines to the Contracts constitutes the Arbitrator exceeding his powers as proscribed by S.C. Code Ann. § 15-48-130(a)(3); see *Waldo v. Cousins*, 442 S.C. 662, 668, 901 S.E.2d 276 (2024) (arbitrator exceeds his powers when he imposes his own policy choice.) (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)).

III. THE ARBITRATOR'S FINAL AWARD DOES NOT MEET THE PRECEDENTIAL STANDARD ADOPTED BY THE *TCC OF CHARLESTON* COURT IN SOUTH CAROLINA FOR A FINDING A "REASONED AWARD"

Respondent argue that "[t]his Court should continue to apply South Carolina's standard for reasoned awards, which ensures that arbitrators provide sufficient reasoning to enable review under § 15-48-130 while maintaining South Carolina's policy of favoring arbitration for dispute resolution." Respondents' Initial Brief, p. 15. In support of this argument, Respondents cite *TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 232, 918 S.E.2d 699, 716-17 (Ct. App. 2025) ("It is well settled that arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable' and if a ground for the award can be inferred from the facts, the award should be confirmed") (quoting *Renaissance Enter., Inc. v. Ocean Resorts, Inc.*, 310 S.C. 395, 399, 426

S.E.2d 821, 823 (Ct. App. 1992)); see also *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 77, 488 S.E.2d 335, 338 (1997) ("If the grounds for the award can be inferred from the facts, the award should be confirmed.").

First, the parties agreed that Contracts were subject to binding arbitration pursuant to SC Title 15 Chapter 48 of the South Carolina Uniform Arbitration Act and all disputes arising out of the Contracts "shall be settled under the Commercial Arbitration Rules of the American Arbitration Association." Contract to Provide His-and-Her Master Closets (). The parties have a right to determine the rules that the arbitration would be subject to. *Parsons v. Homes*, 418 S.C. 1, 17, 791 S.E.2d 128, 136 (2016) ("when a court interprets an arbitration agreement, 'the parties' intentions control' such that the court's interpretation merely 'give[s] effect to the contractual rights and expectations of the parties.'") (citing *Stolt–Nielsen*, 559 U.S. at 681-82, 130 S.Ct. 1758, 176 L.Ed.2d 605).

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." This provided the indication that the Arbitrator determined that a reasoned award was appropriate. Therefore, the

Arbitrator, through the terms in the Contracts was required to provide a reasoned award in the interim and final awards in order to comply with the agreement the parties had in the Contracts.

Second, the Court in *TCC Charleston* chose to impose a New York court's guidance on how to determine a reasoned award having the same basis as indicated by Appellants. *TCC of Charleston*, 446 S.C. at 232, 918 S.E.2d at 716 (citing 17 *Tully Constr. Co./A.J. Pegno Constr. Co., J.V. v. Canam Steel Corp.*, No. 13 CIV. 3037(PGG), 2015 WL 906128, at *15 (S.D.N.Y. Mar. 2, 2015) (stating a reasoned award is "an award that is provided with or marked by the detailed listing or mention of expressions or statements offered as a justification . . . [for] the decision of the [arbitrator]" (alterations in original) (quoting *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011)). Thus, the court in *TCC Charleston* applied this standard for determining whether the arbitrator made a reasoned award, but the Court merely found that the nine-page order issued by the arbitrator had the detail needed for finding that the arbitrator's reasoned award was sufficient. In this case, the Arbitrator's Final Award had one paragraph that encompassed less than one page in ruling against Appellants' nine counterclaims. If the same standard used by the *TCC of Charleston* court is applied, Appellants argue that the Arbitrator did not provide a detailed listing or mention of expressions or statements offered as a justification for his decision. Therefore, the failure of the Arbitrator exceeded his powers in failing to make a reasoned award as required by the Contracts between the parties,

IV. APPELLANTS HAD THE FACTS AND ARGUMENTS IN PLACE AT THE TRIAL COURT THAT SUPPORT A SHOWING THAT THE ARBITRATOR EXCEEDED HIS POWERS WHEN HE SET ASIDE THE DESIGN OWNERSHIP PROVISION IN THE CONTRACTS

Respondents argue that use of the fair use defense in support of the Arbitrator exceeding his powers should not be heard by this Court using a basis that the argument was not raised at the trial court. Respondents' Initial Brief, p. 15. Respondents argument is not supported by the motion

for vacatur, answer and defenses to amended petition for order confirming arbitration award, the memorandum in support of respondents' motion for vacatur and opposition to petitioner's petition for order confirming arbitration award, and the oral arguments presented to the trial court.

The motion for vacatur indicates that "the Arbitrator chose to relieve Bryan Reiss and Distinctive Design of any copyright infringement liability by applying the fair use defense." Motion for Vacatur, ¶ 51 (). Appellants denied Respondents' factual assertion that "the Arbitrator did not exceed his powers nor so imperfectly execute them that a mutual, final and definite award upon the subject matter was made. Respondents' Answer and Defenses to Amended Petition for Order Confirming Award, ¶ 28 ().

Appellants provided that the basis of their copyright claims before the Arbitrator was the statement on the front page of each of the Contracts that indicate "[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." Respondents' Memorandum in Support of Respondents' Motion for Vacatur and Opposition to Petitioner's Petition for Order Confirming Arbitration Award, p. 19 (). When addressing the Arbitrator's use of the fair use defense to overcome the copyright infringement claims, Appellants argued that "South Carolina courts have recognized that an arbitrator exceeds his powers under S.C. Code Ann § 15-48-130(a)(3), when the arbitrator's decision is a 'manifest disregard of the law'" citing *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. Id. at p. 8 ().

Appellants also argued before the trial court that "the arbitrator exceeding his powers going well beyond the contracts—which obviously is what arbitration is for, is the arbitrator contract at issue in those terms within the contract." Hearing Transcript, p. 23, ll. 11-14 (). Appellants further argued to the trial court that the arbitrator should not have used fair use to rule against copyright

infringement on a commercial case. *Id*. at p. 24, ll. 12-15 (). Indeed, application of this principle against the design ownership provision of the Contracts, which is the primary basis for Appellants' copyright infringement claim is a manifest disregard of the law whereby the Arbitrator exceeded his powers. Appellants respectfully maintain that this principle was fully argued in the Motion for Vacatur and before the trial court and has been properly preserved and presented for appeal before this Court.

V. THE ARGUMENTS INCLUDED IN THE INITIAL BRIEF OF RESPONDENTS DO NOT SUPPORT A SHOWING THAT THE ARBITRATOR'S FINAL AWARD SHOULD NOT BE VACATED

Law and precedent support a finding that Appellant's argued before the trial court that their motion to vacate the Arbitrator's Final Award was timely; while the breach of contract claims asserted by the Petitioners had a significant relationship to the Contracts, the Arbitrator should not have found deadlines in the Contracts for completion of the work since there was not agreement amongst the parties to support such deadlines; and the Arbitrator exceeded his powers when he failed to issue a reasoned award pursuant to the agreement the parties had in the Contracts and imposed a fair use defense that cancelled the design ownership provision in the Contracts that would have otherwise gave Appellants' ownership rights in the designs they created.

CONCLUSION

For all the reasons asserted in the Initial Brief of Appellants and 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.

March 2, 2026

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