THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2017-CP-04-376

Raghu Athimoolam and Irene Athimoolam,.....Respondents,

v.

Meritage Homes of South Carolina, Inc.....Appellant.

APPELLANT'S FINAL BRIEF

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II. Did the arbitrator and trial court err by not imposing sanctions against Respondents, who intentionally disclosed confidential settlement information from a mediation to the Arbitrator after the first award?

STATEMENT OF THE CASE

This lawsuit is a construction defects claim involving a house located at 116 Ariel Way in Easley, South Carolina. Respondents (Raghu Athimoolam and Irene Athimoolam) filed a Summons and Complaint against Meritage Homes of South Carolina, Inc. ("Meritage") with the Anderson County Court of Common Pleas on February 24, 2017. ROA 23. Appellant moved to stay the litigation and to compel arbitration pursuant to terms of the New Home Purchase Agreement between the parties that compelled arbitration pursuant to the terms of the contract and the Federal Arbitration Act ("FAA"). ROA 35. By consent order filed August 30, 2017, the parties agreed to stay the litigation and to compel arbitration pursuant to the terms of the sales contract and the FAA. ROA 1.

On February 11, 2020, Meritage filed an Answer to Amended Complaint and Third-Party Complaint that named various subcontractors and vendors implicated by the Athimoolams' claims. ROA 62.[1] Ultimately, Meritage settled its claims against the subcontractors, who were dismissed from the proceedings by a Stipulation of Dismissal filed July 12, 2023. ROA 76. The Athimoolams' claims against Meritage proceeded to an arbitration hearing, which was conducted by Becky Laffitte on September 21-22, 2023. The Arbitrator issued the Award on October 4, 2023 by email to the attorneys for the parties. ROA 81. Shortly before that publication, the

[1] The trial court's Consent Order Allowing Answer and Third-Party Complaint filed on February 11, 2020 lifted the previous stay to allow for the filing of the pleading, which brought the implicated subcontractors and vendors into the proceedings. ROA 4.

Arbitrator filed the "Proof of ADR" with the Anderson County Clerk of Court on October 4, 2023, which stated "Order following arbitration will be issued on or before October 4, 2023." ROA 103.

The 21-page October 4, 2023 Arbitration Award included a cover letter in which the Arbitrator stated she based "the Order … on the testimony and evidence presented" at the September 21-22, 2023 arbitration hearing. Id. The Arbitrator awarded Athimoolams Fifty-One Thousand Four Hundred Thirteen and 88/100 Dollars ($51,413.88). Id.

The Athimoolams objected to the October 4, 2023 Arbitration Award and submitted a motion to reconsider to the Arbitrator on October 16, 2023. ROA 105. The Athimoolams then submitted a "supplemental memorandum" and documents on November 22, 2023. ROA 144. Meritage filed responsive memoranda on October 30, 2023 (ROA 121) and January 5, 2024 (ROA 151) opposing any alteration of the October 4, 2023 First Arbitration Award.

The Arbitrator then completely changed the award and gave the Athimoolams Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100 Dollars ($320,917,63) by order filed January 23, 2024. ROA 180. In response, Meritage filed a "Motion to Vacate the January 23, 2024 Arbitration Award and Motion to Reinstate the October 4, 2023 Arbitration Award" on February 2, 2024. ROA 207. Meritage asked the trial court for an order (a) vacating the purported January 23, 2024 Arbitration Award; (b) ruling the Arbitrator lacked subject matter jurisdiction to vacate or modify the October 4, 2023 Arbitration Award; (c) sanctioning Athimoolams for intentionally violating the ADR Rules after the Arbitrator issued the October 4, 2023 award; and (d) reinstating the October 4, 2023 Arbitration Award. Id.

Judge Scott Sprouse denied the motion by order filed October 25, 2024. ROA 9. Thereafter, Meritage filed a motion pursuant to Rule 59(e), SCRCP, on November 4, 2024. ROA 488. Judge Sprouse denied that motion by order filed on November 6, 2024. ROA 19.

Meritage then filed this appeal of the orders by Judge Sprouse filed on October 25, 2024 and November 6, 2024 and concerning the second arbitration award on

January 23, 2024. Meritage received notice of the filed order denying its Rule 59(e), SCRCP, motion on November 6, 2024.

STANDARD OF REVIEW

S.C. Code Ann. § 15-48-130(a) and 9 U.S.C. §§ 10-11 provide the basis for a court to vacate an arbitration award in this matter. "An Arbitrator's award may only be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "[M]anifest disregard is an exacting standard, but it is not insurmountable." C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361 (2013).

STATEMENT OF FACTS

The matter between the Athimoolams and Meritage was submitted to binding arbitration to be conducted pursuant to the FAA. The "Consent Order Staying Case and Compelling Arbitration" for this matter was agreed to by both parties and filed with this Court on August 30, 2017. The Athimoolams have never disputed that the FAA did not apply to the dispute. The arbitration order, in fact, specifically stated that "Athimoolams agree that this action should be stayed and arbitration compelled pursuant to the terms of the [Construction] Agreement and the FAA." ROA 1. Further, the "New Home Purchase Agreement" ("Contract") between Athimoolams and Meritage, which was Exhibit 1 at the arbitration between the parties, specifically stated at the top of the first page:

> **THIS AGREEMENT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT AND IF THE FEDERAL ARBITRATION ACT IS INAPPLICABLE, THE UNIFORM ARBITRATION ACT SECTION 15-48-10 ET SEQ., CODE OF LAWS OF SOUTH CAROLINA 1976, AS AMENDED.**

ROA 530.

Both parties used expert testimony at the September 2023 arbitration to advance their respective positions. Meritage contested the vast majority of the alleged defect claims and the amount needed to repair any defective condition. After hearing the testimony and reviewing the evidence, the Arbitrator awarded the Athimoolams Fifty-One Thousand Four Hundred Thirteen and 88/100 Dollars ($51,413.88). The "Proof of ADR" filed on October 4, 2023 stated "Order following arbitration will be issued on or before October 4, 2023." ROA 103. The Arbitrator then emailed the Arbitration Award, which included a cover letter to the award in which the Arbitrator stated she based "the Order … on the testimony and evidence presented" at the September 21-22, 2023 arbitration hearing. ROA 81.

The Athimoolams filed a motion to reconsider the Arbitration Award on October 16, 2023 and supplemental memorandum and documents on November 22, 2023. ROA 105 and ROA 144. The Athimoolams argued:

1. The Award makes numerous finding that are completely unsupported by the evidence and are based on assumptions of defense counsel;
2. The Award is fundamentally flawed because of fundamental errors with respect to applicable law and even the burden of proof;
3. The Award reflects a flagrant disregard of uncontroverted evidence, including expert testimony; and
4. The errors reflect above reflect an improper partiality towards Meritage which justifies reconsideration of the Award or vacating the Award in its entirety.

Id. As part of the motion, the Athimoolams also submitted the following argument:

VIII. The Arbitrator's Award is Erroneous, and Her Impartiality is Established by Meritage's Settlement with its Subcontractors.

> As the Arbitrator is aware, this case was commenced in Circuit Court and arbitrated between Meritage and Plaintiffs by agreement. In Circuit Court, Meritage asserted indemnity claims against the Subcontractor Defendants to recover any sums Meritage was required to pay Plaintiffs arising from the faulty work of the Subcontractor Defendants. In reliance of the reports and testimony of Plaintiffs' experts, including Clements and Schauder, Meritage pursued claims against those Subcontractor Defendants, securing settlements from the Subcontractor Defendants totaling $350,000.00.
>
> ***To be clear: The testimony and opinions of Plaintiffs, and their experts, which the Arbitrator heard at arbitration and blithely disregarded at the request of Meritage's counsel, is the same evidence that allowed Meritage to recover $350,000.00 from its subcontractors.***

Id. The Athimoolams knew about the settlement because those funds were offered to them as part of the mediation process conducted before the arbitration. Such information was confidential pursuant to the rules applicable to ADR in this state.

Meritage opposed that motion and argued the items that are raised by this appeal. ROA 121 and ROA 151. Essentially, Meritage argued that the arbitrator lacked authority under the FAA and South Carolina to change the original arbitration award based on the Athimoolams' arguments and that the Athimoolams' "intentional and blatant violation of the confidentiality provision of the applicable South Carolina Alternative Dispute Resolution Rules by including in their current motion the specific amount of the settlement between Meritage and its subcontractors should not and cannot be tolerated." Id.

On January 23, 2024, the Arbitrator issued a second award of Three Hundred Twenty Thousand Nine Hundred Seventeen and 63/100 Dollars ($320,917,63) by order filed January 23, 2024. Meritage then filed a "Motion to Vacate the January 23, 2024 Arbitration Award and Motion to Reinstate the October 4, 2023 Arbitration Award" on February 2, 2024. ROA 207. Meritage asked the trial court for an order (a) vacating the purported January 23, 2024 Arbitration Award; (b) ruling the Arbitrator lacked subject matter jurisdiction to vacate or modify the October 4, 2023 Arbitration Award; (c) sanctioning Athimoolams for intentionally violating the ADR Rules after the Arbitrator issued the October 4, 2023 award; and (d) reinstating the October 4, 2023 Arbitration Award. Id.

Meritage argued the Arbitrator erred by (1) concluding the FAA did not apply; (2) by improperly modifying the October 4, 2023 Arbitration Award because none of the circumstances allowing the alteration of the October 4, 2023 Arbitration Award existed under the FAA or under the South Carolina Uniform Arbitration Act; (3) the Athimoolams' motion for reconsideration did not meet the Arbitration Rules and Comprehensive Procedures of the Judicial Arbitration and Mediation Services ("JAMS"), as mandated by the contract between the parties; and (4) not sanctioning Athimoolams for the intentional and blatant violation of the confidentiality provision (Rule 8) of the South Carolina Alternative Dispute Resolution Rules by including with their motion for reconsideration the specific dollar amount of the prior confidential settlement between Meritage and its subcontractors. Id.

Judge Sprouse held a hearing on August 14, 2024 and then issued an Order on October 25, 2024 that denied Meritage's motion. ROA 9. Judge Sprouse found that the Arbitrator did not meet the statutory grounds to modify the October 4, 2023 Arbitration Award, but that he was restrained in vacating or modifying the January 23, 2024 second award. Id. Meritage timely filed the Rule 59(e) motion, in which it argued the trial court erred by (1) not vacating the January 23, 2024 second award after finding that the Arbitrator lacked the authority to modify the October 4, 2023 Arbitration Award (2) concluding that the October 4, 2023 Arbitration Award had to be filed with the Clerk of Court in order to be considered an official arbitration award;

and (3) not assessing sanctions because of the Athimoolams' violation of the confidentiality provision (Rule 8) of the South Carolina Alternative Dispute Resolution Rules by including the specific dollar amount of the prior confidential settlement between Meritage and its subcontractors. ROA 488. Judge Sprouse denied that motion, and this appeal followed. The Athimoolams did not appeal the determination that the Arbitrator's modification of the October 4, 2023 Arbitration Award was improper because it did not comply with the statutory requirements to modify an arbitration award.

ARGUMENTS

I. THE TRIAL COURT ERRED WHEN THE TRIAL COURT DID NOT VACATE THE SECOND ARBITRATION AWARD ISSUED ON JANUARY 23, 2024 AFTER THE TRIAL COURT DETERMINED THE ARBITRATOR LACKED AUTHORITY TO MODIFY THE FIRST ARBITRATION AWARD ISSUED ON OCTOBER 4, 2023.

The trial court correctly ruled the Arbitrator lacked authority under the South Carolina Uniform Arbitration Act (S.C. Code Ann. §§ 15-48-100 et seq.) to modify the October 4, 2023 Arbitration Award; however, the trial court erred when it determined that the court did not have the ability to vacate the improper second arbitration award. South Carolina courts have reversed arbitrator's decisions when the decision constituted a "manifest disregard of the law" because the arbitrator exceeded the arbitrator's powers. C-Sculptures, LLC v. Brown, 403 S.C. 53, 742 S.E.2d 359 (2013) (citing S.C. Code Ann. § 15-48-130 and Gissel v. Hart, 382 S.C. 235, 676 S.E.2d 320 (2009). Clearly. the arbitrator in this matter "exceeded her powers" in contravention of S.C. Code Ann. § 15-48-130(3) by modifying an arbitration award using factors that did not meet the required statutory grounds defined by S.C. Code Ann. § 15-48-100. Once the trial court found the violation of that section, the trial court should have vacated the second award pursuant to S.C. Code Ann. § 15-48-130(3) and/or the applicable case law.

In C-Sculptures, LLC, that court noted "[a]n arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew

of a governing legal principle yet refused to apply it." Id., 742 S.E.2d at 360. See also Waldo v. Cousins, 442 S.C. 662, 901 S.E.2d 276 (2024) (vacating arbitration award). Here, as noted by the trial court, the arbitrator clearly disregarded the mandates of South Carolina law and the FAA.

In addition, at a minimum, the second arbitration award also violated the provisions of the FAA. The parties agreed the FAA applied to the matter, as evidenced by the Consent Order referring the case to arbitration. The FAA does not allow an arbitrator to modify an award--only a court of competent jurisdiction can do that in certain, very limited circumstances. Here, the Athimoolams' motion for reconsideration of the October 4, 2023 Arbitration Award and the second award did not meet the FAA requirements, particularly the provisions of 9 U.S.C. §§ 10-11, to warrant alteration of the October 4, 2023 Arbitration Award. These are jurisdictional requirements, and the trial court erred by not vacating the second award pursuant to the terms of the FAA.

9 U.S.C. § 10(a) provides that an arbitration award may be vacated by the court (not an arbitrator) only under the following circumstances:

> 1. where the award was procured by corruption, fraud, or undue means;
>
> 2. where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> 4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Further, 9 U.S.C. § 11 provides an arbitration award may be modified or corrected by the court (not an arbitrator) only under the following circumstances:

> (a) Where there was an evident material miscalculation of figures or

an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

None of those factors apply to these facts. Thus, the Arbitrator lacked the authority to modify the October 4, 2023 award under the FAA. Moreover, any "modified" arbitration award after the October 4, 2023 award would be subject to vacatur under the FAA, more specifically, 9 USC § 10(a)(4). In fact, this exact issue was examined by the Fifth Circuit in Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556 374 F.3d 372 (5th Cir. 2004).

Therein, an arbitration award was issued to the plaintiff but "[q]uestions about taxation of additional costs and the arbitration panel's authority to modify its initial award gave rise to this controversy. The arbitral panel determined that it had such authority and modified the award to tax additional costs against the [defendant], favoring [plaintiff]. In district court [plaintiff] moved to confirm the modified award and the [defendant] opposed confirmation of the award as modified, but not the original award. The district court agreed with the [defendant] and vacated the modified award, confirming only the original award." Id. at 374.

As noted by that court, "[a]rbitration is a matter of contract; a party cannot be required to submit to arbitration unless it agreed in advance that the dispute would be arbitrated. [Footnote omitted.] Although the law imposes a presumption in favor of arbitrability, the policy that favors resolving doubts in favor of arbitration 'cannot serve to stretch a contractual clause beyond the scope intended by the parties or authorize an arbiter to disregard or modify the plain and unambiguous provisions of the agreement.' " Id. at 374–375.

Indeed "[t]he plain wording of the arbitration agreement contemplates that the arbitrators will not consider correcting the arbitral award at all at the behest of

the parties, and forbids a correction or amendment on the arbitrators own motion more than three business days after the award. We conclude that the modification made was beyond the reach of the arbitrators' power. If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision." Id. at 375.

Clearly, the Arbitrator exceeded her jurisdiction and erred by issuing a second arbitration award, and the alteration of the October 4, 2023 Arbitration Award was not proper because none of the factors enumerated in either section referenced above applied to these facts. And, as stated, the specific terms of 9 U.S.C. §10(a)(4) require this Court to vacate the second award. If a party, such as Meritage in this matter, demonstrates "one of the infirmities listed in §10 of the [FAA]", the court must vacate the award. Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 333 S.E.2d 781 (1985).2

The FAA clearly gave the trial court the power to vacate the improper January 23, 2024 second award. Section 10(a)(4) provides that an arbitration award may be vacated when the arbitrator exceeded his/her powers. As this Court noted, the reasons stated by the arbitrator to support the second award did not meet the requirements to modify or correcting the first award; therefore, the arbitrator did not have the power or authority to issue the second award. Similarly, "[t]he permissible common law grounds for vacating an [arbitration] award 'include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law.'" Dewan v. Walia, 544 Fed. Appx. 240 (4th Cir. 2013) (emphasis added). "… [A] manifest disregard of the law is established only where the 'arbitrator[] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same.'" Id. "Manifest disregard requires that '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator refused to heed that legal principle.'" Constellium Rolled Products Ravenwood, LLC v. United

2 That case states "The Federal Arbitration Act essentially requires that this Court must 'uphold the award unless the challenging party demonstrates one of the infirmities listed in § 10 of the Act.'"

Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers Int'l Union AFL-CIO/CLC, 18 F.4th 736 (4th Cir. 2021).

Further, the trial court erred in requiring the October 4, 2023 Arbitration Award to be filed with the Clerk of Court in order for that award to be considered final. The FAA and S.C. Code Ann. §§ 15-48-10 et seq. do not require an arbitration award to be filed with any Court or Clerk of Court for the award to be considered an official arbitration award. Specifically, section 9 of the FAA allows the court to confirm an arbitration award "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration …." 9 U.S.C. § 9. But, the FAA does not require the award to be filed with any court in order for the award to be subject to the provisions of sections 10 and 11 regarding challenges to the award. The FAA only requires a filing with the clerk of court when a party moves for an order confirming, modifying, or correcting an arbitration award, as stated in 9 U.S.C. § 13.

Furthermore, S.C. Code Ann. § 15-48-90, entitled "Award", does not require any filing of the arbitration award but only that the arbitrator provide a copy of the award to each party.

> SECTION 15-48-90. Award.
>
> (a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

The subsequent sections of the South Carolina Act provide the steps to change the arbitration award. Then, if either party wants a court to confirm the arbitration award, S.C. Code Ann. § 15-48-120, provides that option:

> Upon application of a party, the court shall confirm an award, unless within the time limits hereafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140.

As noted in Henderson v. Summerville Ford-Mercury, 405 S.C. 440, 748 S.E.2d 221 (2013), the confirmation proceeding "ordinarily is not initiated unless one of the parties refuses to abide by the award or unless it be the desire of a party that an official record of the confirmation and judgment be made." 748 S.E.2d at 227 quoting 6 C.J.S. Arbitration § 178 (2004). "Confirmation is not a separate judicial process; it is merely a continuation of the arbitration procedure. See generally 6 C.J.S. Arbitration § 181 (2004) (stating a proceeding for confirmation of an arbitration award is not a trial or a separate proceeding, and generally, the only courses of action open to the court are limited to the statutory grounds for review, such as to confirm the award, correct then confirm the award, vacate the award, or dismiss the proceeding …." Id.

Additional case law supports the conclusion that the FAA and the South Carolina Uniform Arbitration Act do not require an arbitration award to be filed to be considered "the" arbitration award. See Remmey v. PaineWebber, 32 F.3d 143 (4th Cir. 1994) (finding without merit a claim that the arbitration award in that case did not constitute a "mutual, final, and definitive award" as contemplated by 9 U.S.C. § 10(a)(4)). Further, an arbitration award is "final" under the FAA if it "resolve[s] all issues submitted to arbitration." Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 177 (2d. 1998). Clearly, the October 4, 2023 Arbitration Award in this case did just that.

"[T]he proper standard for vacating an award on this ground is whether the failure to decide an issue causes the award to lack mutuality, finality, and definiteness." Harper Builders, Inc. v. Edens, 282 S.C. 379, 318 S.E.2d 363 (1984). There can be no doubt that the October 4, 2023 Arbitration Award constituted a "mutual, final, and definite award." First, the Arbitrator filed the Proof of ADR that specifically stated "Order following arbitration will be issued on or before October 4, 2023." Secondly, the October 4, 2023 Arbitration Award concluded very specifically:

> "Therefore, it is hereby Ordered, Adjudged, and Decreed that the Athimoolams are awarded the sum of **Fifty-One Thousand Four Hundred Thirteen and 88/100ths ($51,413.88) Dollars**."

The October 4, 2023 ruling states "quite unambiguously" the Arbitrator's decision, which was "hereby Ordered, Adjudged, and Decreed." That determination as of October 4, 2023 was "final and definite."

As background, the October 4, 2023 First Arbitration Award was based on proper findings of fact and proper application of South Carolina law based on the evidence presented at the arbitration hearing. The Arbitrator later improperly considered claims and submissions provided after October 4, 2023. The South Carolina Supreme Court's decision in Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) also controls the claimed damages issue. In Fields, the homeowner sued the builder alleging construction defects associated with an EIFS-clad home. The homeowner claimed the EIFS allowed moisture to enter the home, which caused significant damage to the structure. The jury awarded the homeowners $6,000.00 in damages. The South Carolina Supreme Court affirmed that jury's verdict.

Chief Justice Jean Toal (who was the author of the one sentence quoted by Athimoolams' counsel from the Kennedy v. Columbia Lumber & Mfg. Co., Inc.[3] case) wrote the Fields opinion. In Fields, Justice Toal wrote, in affirming the $6,000.00 jury award,:

> It was, of course, possible for the jury in this case to conclude, consistent with this testimony, that only five percent of the house had damage and that the calculations offered by the Builder's estimating expert represented reasonable repair costs. It was thus possible for the jury to arrive at an award of $6,000 based on evidence presented at trial in this case.

376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). The significance of the Fields decision cannot be ignored. That decision clearly rejects Athimoolams' current contention that the Kennedy decision somehow requires that a homeowner be awarded whatever the homeowner requests during litigation if a building code

3 299 S.C. 335, 384 S.E.2d 730 (1989)

violation exists from the original construction of a home. The Kennedy decision did not state that a homeowner was entitled to the costs for full removal and replacement of all building elements if a building code issue existed. And, the Fields opinion made it very clear that the trier of fact was to evaluate the claims based on the extent of any damage and what represented "reasonable repair costs." 376 S.C. at 569, 658 S.E.2d at 92 (emphasis added). That is what the October 4, 2023 Arbitration Award found, and nothing in the post-award motion can alter that decision.

While the arbitrator did not record the testimony, in this matter, Meritage's construction/engineering expert Jay Rogers clearly testified that the cost that needed to be expended to address the legitimate concerns raised by Athimoolams from original construction would be approximately $25,000.00-30,000.00. ROA 565, ROA 121, and ROA 151. Rogers further allocated those expenses to each claimed defect. While not intending to, Athimoolams' architect expert Clements agreed with certain aspects of Rogers' testimony that a wholesale stripping of the house was not required to address the issues. For example, Clements testified that the entire roof did not need to be replaced, yet Athimoolams' repair contractor Matthew Harmon ignored that and nevertheless included a substantial amount for the complete removal and replacement of all roofing and flashings. In addition, Harmon's estimate included numerous examples where he misunderstood Clements' scope (see exterior deck and garage repairs) and also included items that Clements did not indicate needed to be repaired (perimeter foundation, entire sheathing, etc.). ROA 497, ROA 121, and ROA 151.

Rogers testified that the complaints regarding the siding installation, stone installation, and brick installation could be addressed using localized repairs as opposed to the wholesale removal and replacement of those items. Rogers also pointed out that Clements performed numerous destructive cuts into the claddings and many of those test cuts and observations must not have shown any code violation or damage, because Clements did not include those areas during his testimony as the findings did not advance Athimoolams' claims. Clements based his call for remediation of the siding, for example, on just a few places, which Rogers responded

could be faced nailed and repainted without removing all of the siding. Id. Any brick error can be remedied with a localized repair. Id. The one location of stone where Clements found exposed wood framing can be repaired by removing that stone, adding peel and stick flashing, and re-adhering the stone. That location does not warrant the full replacement of all stone. Id.

To reward Athimoolams with an award based on the bloated estimate from Harmon also would constitute "economic waste" because many of the expenses Harmon listed would be to "repair" areas of the home where no person has testified that any defect exists and would also ignore that Clements only cited very limited areas of the house with any concern. For example, Clements only testified about one window where the nailing was not proper. He did not note any adverse impact to the structure or any other window with a similar installation. No evidence in the record exists to support a claim that every window at this residence needs to be removed and replaced. To the contrary, Rogers confirmed that the windows and doors were installed to industry standards at the time of construction and that Clements' recommendations would be unnecessary and would constitute a betterment and be economically wasteful. Id.

Further, the evidence clearly showed that Harmon lacked the experience and knowledge of construction in Anderson County. He could not provide a legitimate repair estimate for this residence because he lacked the professional ability, experience, and subcontractors to issue a repair estimate for a single-family house in Anderson County. As he admitted, he was licensed as a residential builder for merely two months when he was hired by Athimoolams' counsel for the estimate, he had never worked in Anderson County or the upstate of South Carolina, and he had no subcontractor or material supplier within 150 miles of the house. On the other hand, Rogers was clearly qualified as a contractor and an engineer, and he has actually worked in Anderson County. Rogers' testimony was that Harmon's scope was excessive and his pricing was out of line with what would be charged where this home is located. "Excessive and overstated" is how Rogers described Athimoolams' defect claims. Id. Rogers also pointed out that the 2021 estimate from Athimoolams of

$413,257 was "unwarranted." That testimony also confirmed the overzealous scope and pricing from Harmon's 2023 estimate, which was more than twice the 2021 estimate given to Athimoolams by another contractor. Harmon's methodology of relying on a single computer program to generate a repair estimate for a house more than 100 miles away from any city where he has ever worked (and where he has no subcontractors or material suppliers) is not legitimate. Accordingly, any award to Athimoolams based on Harmon's estimate (a) would never be "fair, just, and reasonable", which is the standard under South Carolina law for any jury to base an award of actual damages (S.C. Requests to Charge – Civil § 13-2) and (b) would violate the requirements of the Fields decision that the award be based on the actual extent of damage and what constituted "reasonable repair costs."

II. THE COURT ERRED BY NOT SANCTIONING THE ATHIMOOLAMS' CLEAR VIOLATION OF RULE 8 OF THE ARBITRATION RULES AFTER THEY INTENTIONALLY DISCLOSED CONFIDENTIAL INFORMATION FROM AN EARLIER MEDIATION TO THE ARBITRATOR AS PART OF THE MOTION FOR RECONSIDERATION OF THE OCTOBER 4, 2023 ARBITRATION AWARD.

In the Athimoolams' motion for reconsideration of the October 4, 2023 Arbitration Award, the Athimoolams intentionally and blatantly violated the confidentiality provision (Rule 8) of the South Carolina Alternative Dispute Resolution Rules by including the specific dollar amount of the prior confidential settlement between Meritage and its subcontractors. The arbitrator and trial court erred by ignoring this misconduct and the obvious prejudice to Meritage. The second arbitration award resulted in an approximate 7-fold increase in the monetary award to the Athimoolams based off the blatant violation of the ADR Rules.

Rule 8 of the ADR Rules very clearly states that "any mediation communications disclosed during a mediation … shall be confidential, and shall not be divulged by anyone in attendance at the mediation participating in the mediation" except as permitted by circumstances that do not apply here. Rule 8 further requires: "The parties and any other person present or participating [in the mediation] shall

maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence at any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation ...." (emphasis added in both).

Every mediation conducted in South Carolina includes a specific disclosure and warning by the mediator to the parties at the start of the mediation that all mediation discussions and negotiations are confidential and that none of the discussions and negotiations held during a mediation can be disclosed at any trial or hearing. This significant guarantee of confidentiality must be enforced. Otherwise, the negative impact to every mediation to be conducted is obvious, and the negative impact to every mediation moving forward because of this conduct cannot be understated.

The rationale for the confidentiality rule is clearly designed for an open discussion of the issues and settlement offers and demands in an effort to resolve all pending claims. To allow a party who participated in a mediation to intentionally disclose the confidential settlement discussions from a mediation in an obvious and blatant effort to gain an advantage in a post-arbitration motion should never be allowed and should be sanctioned. Otherwise, the impact of this conduct will be obvious. Moving forward, any party who does not settle at a mediation and who thinks they did not prevail at a subsequent trial or arbitration will intentionally disclose mediation conversations, including offers, demands, and settlements with others, in an attempt to undo a result that the party does not like. Athimoolams' conduct runs directly in contradiction of the mediation process.

An immediate mistrial would have been required if the Athimoolams in this case had disclosed the confidential information during a trial or during the arbitration hearing. To allow the Athimoolams to disclose that information without the sanction being an immediate dismissal of their pending motion only rewarded their egregious conduct. However, our appellate courts and the applicable rules do not reward that bad faith conduct. See Jones v. Robinson, 2023-UP-369 (S.C. Ct. App. Unpublished opinion filed November 15, 2023) (holding, among other things, that sanctions were appropriate for mediation abuses pursuant to Rule 10(b), SCADR, to include "payment of attorney's fees, neutral's fees, and expenses incurred by persons

attending the conference; contempt; *and any other sanction authorized by Rule 37(b), SCRCP[.]"* (emphasis in original). Rule 37(b), SCRCP, permits dismissal as a sanction. Here, the Athimoolams clearly acted intentionally and in bad faith. Their conduct mocks the mediation rules and should not be tolerated. Furthermore, Athimoolams cannot credibly argue that the intentional disclosure of the confidential settlement information did not have a significant negative impact on this matter and on the mediation process in general. If the Court allows this willful and deliberate conduct to go unchecked, such behavior will alter the mediation process throughout this state.

The Athimoolams are and were bound by the confidentiality requirements of the ADR Rules. Their intentional violation of the confidentiality requirement can only be explained as an attempt by them to improperly gain an advantage with the Motion for Reconsideration submitted to the arbitrator, as an attempt to improperly influence the outcome of their Motion for Reconsideration, and as an attempt to prejudice Meritage. That conduct runs counter to the spirit and purpose of the ADR process. The Athimoolams took the risk of not settling at mediation and forcing this matter through arbitration. They should not now be allowed to use a confidential settlement entered into by other parties to unfairly influence an attempt to alter the arbitration award simply because they did not like the October 4, 2023 award.

As mentioned, Rule 10(b) of the ADR Rules provides the sanctions "if any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause," which is certainly the case here. Athimoolams' intentional violation of the ADR Rules is worthy of sanctions, including, at a minimum, vacating the January 23, 2024 Arbitration Award and any additional sanctions at the court's discretion.

In any event, the Athimoolams' claims on this issue ignore the fact that Meritage's settlement with its subcontractors included settlement of Meritage's claims for defense obligations, contractual indemnity, Additional Insured status, bad faith, and payment of past and future defense costs, including, but not limited to attorney's fees and expert witness fees. Moreover, the claim that Meritage's

settlement with subcontractors somehow established a floor for Athimoolams' claims was without any legal support, as evidenced by the fact that Athimoolams did not provide any case law to support that proposition, or factual support. The claim was designed solely to improperly influence the Arbitrator into changing the award.

CONCLUSION

The trial court correctly ruled that the arbitrator did not have a statutory basis to alter the October 4, 2023 First Arbitration Award. The trial court should have then vacated the January 23, 2024 Second Arbitration Award under the applicable South Carolina statute and case law and pursuant to the mandates of the Federal Arbitration Act, which also applied to the matter, and the applicable case law. In this appeal, Meritage respectfully seeks a ruling that reinstates the October 4, 2023 First Arbitration Award and vacates the January 23, 2024 Second Arbitration Award.

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May 13, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2017-CP-04-376

Raghu Athimoolam and Irene Athimoolam,.....Respondents,

v.

Meritage Homes of South Carolina, Inc.....Appellant.

PROOF OF SERVICE

The undersigned, an attorney in this matter for Appellant Meritage Homes of South Carolina, Inc., certifies that I have on May 13, 2025 served a copy of Appellant's Final Brief upon other counsel of record by electronic mail and by depositing a copy with sufficient postage in the United States mail to:

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May 13, 2025