THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appeal Case No.: 2024-001996

Raghu Athimoolam and Irene Athimoolam .... Respondents,

v.

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

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court properly ruled when it did not vacate the January 19, 2024, Final Arbitration Award.

II. Whether the arbitrator and trial court properly ruled by not imposing sanctions against Respondents, who informed the Arbitrator of Meritage's non-confidential settlements with its subcontractors.

STATEMENT OF THE CASE

This is an appeal from the trial court's Order denying Meritage Homes of South Carolina, Inc. ("Appellant") Motion to Vacate. The Honorable R. Scott Sprouse signed the *Form 4 Order Denying Defendant's Motion for Reconsideration pursuant to Rule 59(e)* ("Order Denying Motion for Reconsideration") which was filed November 6, 2024. (R. pp. 19-22.)

This action was brought by Irene and Raghu Athimoolam ("Respondents") and involves construction deficiencies associated with development, construction, and sale of Respondents' residence located at 116 Aerial Way, Easley, South Carolina, 26462 (the "Home"). Appellant was the developer, seller, and general contractor for the construction of the Home, and ultimately attempted and performed certain repairs (Amend. Compl., ¶¶ 3, 5). (R. pp. 30-31.). The defects at issue in the claim include water intrusion, premature degradation of components, structural deficiencies, the presence of mold and mildew, and latent and previously undiscoverable deficiencies (Amend. Compl., ¶ 6). (R. p. 31.) Many of these problems are the results of defects and building code violations. Appellant knew or should have known of these defects for several reasons, including its post-construction repair efforts at the Home. (R. p. 31.)

Respondents filed a Complaint against Appellant on February 2, 2017 (R. pp. 23-28), and an Amended Complaint on March 3, 2017 (the "Complaint") (R. pp. 29-24) asserting claims of Negligence/Gross Negligence, Breach of Implied Warranty of Service, and Breach of the Implied Warranty of Habitability. (*See generally,* Amended Complaint ¶¶ 1-19.) (R. pp. 30-33) Appellant

filed a Motion to Compel Arbitration, which was ultimately consented to on August 30, 2017, and the case was submitted to binding arbitration. (R. pp. 1-3.)

On February 11, 2020, Appellant asserted third-party claims (in Circuit Court) against a number of its subcontractors ("Subcontractor Defendants"). (*See* Appellants Answer to Amended Complaint and Third-Party Complaint.) (R. pp. 62-73.) Those claims were never subject to the arbitration between Respondents and Appellant. Appellant ultimately settled its third-party claims with the Subcontractor Defendants directly, and a Stipulation of Dismissal was filed on July 12, 2023. (July 12, 2023, Stipulation of Dismissal.) (R. pp. 76-80.) As part of that action, Appellant collected Three Hundred Fifty Thousand and No/100 Dollars ($350,000.00) from the Subcontractor Defendants, which is reflected in the Non-Confidential Settlement Agreement between Appellant and those subcontractors (Exhibit 3 to Respondents' Memorandum in Opposition to Motion to Vacate filed March 20, 2024). (R. pp. 423-430.) Respondents were not a party to those negotiations or the Settlement Agreement. Appellant and Respondents were not able to settle their claims.

Arbitration was held on September 23-24, 2023. Following the hearing, the Arbitrator issued her initial award (the "Initial Award") on October 4, 2023. (October 4, 2023, Initial Award). (R. pp. 81-104.) Neither the Arbitrator, Appellant nor Respondents filed the Initial Award with the trial court. Instead, Respondents immediately filed a Motion to Reconsider, based on numerous grounds set forth therein (October 16, 2023, Motion to Reconsider). (R. pp. 105-120.) Both parties submitted memorandums (Respondents' October 16, 2023, Motion for Reconsideration and Memorandum in Support (R. pp. 109-120), Appellant's October 30, 2023, Memorandum in Opposition (R. pp. 121-143)). After careful review of the law and the evidence presented at the arbitration, the Arbitrator requested a hearing with the parties which was held on November 17,

2023, via Zoom. (November 11, 2023, Letter from Respondents following hearing). (R. pp. 144-150). Appellate appeared at that hearing and argued its positions in opposition to Respondents' Motion to Reconsider, never objecting to the jurisdiction of the Arbitrator to conduct the hearing or reconsider her Initial Award. Notably, Appellant did not argue the Arbitrator lacked authority to reconsider the Initial Award until its Motion to Vacate. Rather, Appellant continued to submit to the Arbitrator's jurisdiction and participated in the proceedings. (January 8, 2024, Email Exchanges). (R. pp. 569-571.)

The Arbitrator issued her final award, and filed it with the trial court, on January 23, 2024 (the "Final Award"). (R. pp. 180-206.) The Arbitrator found in her Order, the FAA was not applicable, and no aspect of the arbitration was administered by Judicial Arbitration and Mediation Services ("JAMS"), which was the arbitration procedure called for in Appellants sale contract. (Final Award at 1.) (R. p. 180.)

On February 2, 2024, Appellant filed a Motion to Vacate the January 23, 2024, Arbitration Award and Motion to Reinstate the October 5, 2023, Arbitration Award. (February 2, 2024, Motion to Vacate). (R. pp. 207-355.) Both parties submitted memorandums, and a hearing was conducted on August 8, 2024. (March 20, 2024, Respondent's Memorandum in Opposition (R. pp. 356-487)) (February 2, 2204, Meritage's Motion to Vacate (R. 207-355)). Following the August 8, 2024, hearing, the trial court remanded this matter to the Arbitrator for clarification. (September 5, 2024, Order.) (R. pp. 6-8.) Again, Appellant did not object to the Arbitrator's jurisdiction. The Arbitrator filed a letter on October 3, 2024 (October 3, 2024, Letter from Arbitrator.) (R. pp. 574-575) On October 25, 2024, Judge Sprouse denied Appellant's Motion (October 25, 2024, Order). (R. pp. 9-18.) On November 4, 2024, Appellant filed its Motion to Reconsider pursuant to Rule 59, SCRCP.

(November 4, 2024, Motion.) (R. pp. 488-496.) The Motion was denied on November 6, 2024. (November 6, 2024, Order.) (R. pp. 19-22.)

STANDARD OF REVIEW OF AN ARBITRATION AWARD

As noted below in Section I, in its Initial Brief, Appellant fails to set forth the standard of review, an express requirement of the South Carolina Appellate Court Rule 208(b).[1] That is material in this instance since Respondents are unsure what Appellant contends is the basis of the relief it seeks. This is a continuation of Appellant's legally unsupportable effort to reverse the Arbitrator's decision on the merits, since Appellant likewise failed to provide a basis for relief in its Motion to Vacate in the trial court.

If Appellant seeks to reverse the trial court on the basis of abuse of discretion, the decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548 633 S.E.2d 501 (2006). The decision of the circuit court will not be disturbed on appeal absent a clear showing that the circuit court abused its discretion. *Em-Co Metal Products. Inc. v. Great Atlantic & Pacific Tea Co. Inc.*, 280 S.C. 107, 311 S.E.2d 83 (1984). "An abuse of discretion can only arise when either an order based on factual conclusions is without evidentiary support or the judge issuing an order was controlled by an error of law." *Id*. "The burden always rests upon the appellant to show an abuse of discretion; and in determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances." *Id*.

However, in its brief, Appellant does not mention abuse of discretion and instead simply seeks to try this case again before this Court and relitigates the merits of the arbitration, as it did

[1] Appellant Amended its Initial Brief on April 22, 2025. However, its Amended Initial Brief still fails to set forth this Court's standard of review.

in the trial court. Thus, the standard of review is not abuse of discretion but the significantly narrower scope of review of an arbitration award, which is the scope of review Respondents believe applies, given Appellant's arguments. That standard is set forth herein.

Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. *Gissel v. Hart*, 382, S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "[T]he scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . . .'" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc*, 492 F.3d 520, 527 (4th Cir. 2007). The award is presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award" *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985) (quoting *Newarks Stereotypes' Union No. 18 v. Neward Morning Ledger Co.*, 261 F.Supp, 832 (D.N.J. 1966), *aff'd* 397 F.(2d) 594 (3d Cir. 1968), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed (ed) 365 (1968).

"[C]ourts defer to the arbitral panel both on the merits of the final decision **and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'**" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *UBS Fin. Servs., Inc*, 842 F.3d 336, 339 (4th Cir. 2016)) (emphasis supplied).

Generally speaking, "[a]n award within the scope of submission is conclusive on fact issues and interpretation of law." *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985) (quoting *Oinoussian Steamship Corp. v. Sabre Shipping Cort.*, 224 F. Supp. 807, 809 (D.N.Y 1963) (footnote omitted). Additionally, [cases vacating an arbitration awarded

where there is a manifest disregard of the law] requiring circumstances far more egregious than mere errors in interpreting or applying the law. *Trident Technical College c. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985).

"Manifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." *Bazzle v. Green Tree Fin. Corp.*, 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), *vacated and remanded on other grounds*, 539 U.S. 444, 156 L. Ed. 2d 414, 123 S. Ct. 2402 (2003).

An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is **<u>outside the scope of the arbitration agreement</u>**. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, S. Ct. 1358, 4 L. Ed. (2d) 1424 (1960) (emphasis added).

A party may not attempt to relitigate the merits of the arbitrator[']s resolution of the arbitrable issues under the guise of questioning the arbitrators' power. *Id.; Trident Technical College, supra.*

Under the FAA, 9 U.S.C. §10 (a), grounds for vacating an arbitration award **<u>by the Court</u>** are only allowed when:

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 arbitrator exceeds 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 states modification or correction to an award **by the Court** can be made when:

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.

d. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Similarly, under the SCUAA an arbitration award can only be vacated **by the Court** when one of the following is met:

1. The award was procured by corruption, fraud or other undue means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 15-48-50, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 15-48-20 and the party did not participate in the arbitration hearing without raising the objection;

S.C. Code Ann. §15-48-130 (a). Further, modification of an arbitration award **by the Court** is allowed only when:

> 1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> 2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> 3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

S.C. Code Ann. §15-48-140.

A court's mandate under the plain language of both acts is that confirmation "shall" or "must" be made in the absence of grounds for warranting vacating, modifying, or correcting the award. Confirmation is a ministerial act of recording the results of the arbitration. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221 (2013).

Under the SCUAA, a party may move the circuit court to confirm an award, vacate an award, or modify or correct an award. S.C. Code Ann. §§15-48-10 et seq. "If the application to vacate is denied . . . the court **shall confirm the award**" (S.C. Code Ann. §15-48-130 (d)).

ARGUMENT

I. This Court Must Dismiss the Appeal for Appellant's Failure to Comply With South Carolina Appellate Rule 208.

This Appeal must be dismissed because Appellant's Initial Brief does not comply with the rules. Rule 208 (b), South Carolina Appellate Court Rules states:

> **(b) Content.** The initial briefs under this Rule and the final briefs under Rule 211 **shall contain:**
>
> **(1) Brief of Appellant.** The brief of appellant shall contain under appropriate headings and in the order here indicated:

> **(D) Standard of Review.** If all the issues are governed by the same standard of appellate review, the Brief **shall contain a section with the heading "Standard of Review," which shall concisely set forth the applicable standard of review with citations to relevant case law establishing the standard**. If the same standard of review is not applicable to all of the issues, a separate section with a heading of "Standard of Review" shall be included at the start of the argument on each issue with citations to relevant case law establishing this standard of review.

Appellant's Amended Initial Brief fails to provide this Court with a Standard of Review that sets forth the applicable standard with citations to relevant case law and set forth a basis for jurisdiction of this Appeal. As such, the appeal must be dismissed.

II. The Trial Court Correctly Denied Appellant's Motion to Vacate

The trial court did not err in its October 25, 2024, Order (R. pp. 9-18), or its November 6, 2024, Order (R. pp. 19-22). The trial court correctly (1) refused to vacate or restrict the Final Award; and (2) held the Arbitrator acted within her scope and powers when she requested and received additional evidence and arguments. Appellant continues to attempt to relitigate the merits of the case, which is not permitted (and does so without even the benefit of a record of the testimony).

A. The Trial Court Properly Refused to Vacate or Restrict the Arbitration Award.

The trial court correctly held that no scenario existed for it to vacate or restrict the Arbitration Award. Grounds for court intervention of an arbitration award are limited, and do not apply here. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. *Gissel v. Hart*, 382, S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "[T]he scope of judicial review for an arbitrator's decision 'is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all . . . .'" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *Three S Del., Inc. v. DataQuick Info. Sys., Inc*, 492 F.3d 520, 527 (4th Cir. 2007).

The award is presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award" *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985) (quoting *Newarks Stereotypes' Union No. 18 v. Neward Morning Ledger Co.*, 261 F.Supp, 832 (D.N.J. 1966), *aff'd* 397 F.(2d) 594 (3d Cir. 1968), *cert. denied*, 393 U.S. 954, 89 S.Ct. 378, 21 L.Ed (ed) 365 (1968).

Under the FAA, 9 U.S.C. §10 (a), grounds for vacating an arbitration award **by the Court** are only allowed when:

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 arbitrator exceeds 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 states modification or correction to an award **by the Court** can be made when:

e. 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.

f. 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.

g. Where the award is imperfect in matter of form not affecting the merits of the controversy.

h. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Similarly, under the SCUAA an arbitration award can only be vacated **by the Court** when one of the following is met:

1. The award was procured by corruption, fraud or other undue means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 15-48-50, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 15-48-20 and the party did not participate in the arbitration hearing without raising the objection;

S.C. Code Ann. §15-48-130 (a). Further, modification of an arbitration award **by the Court** is allowed only when:

1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

S.C. Code Ann. §15-48-140.

No scenario exists for judicial intervention in the Final Award and the trial court properly denied Appellants request. (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R.

pp. 19-22)). Further, the court found the Arbitrator was within her right to receive additional evidence. (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R. pp. 19-22)).

When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. *Gissel*, 382, S.C. at, 241. Further, "[C]ourts defer to the arbitral panel both on the merits of the final decision **and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'**" *Group III Mgmt. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 819 S.E.2d 781 (Ct. App. 2018) (quoting *UBS Fin. Servs., Inc*, 842 F.3d 336, 339 (4th Cir. 2016)) (emphasis supplied). Contrary to Appellant's contention, an Arbitrator is vested with authority to determine when her award becomes final, after taking up the arguments and evidence she wishes to consider. In this case, the Final Award was her final decision relating to this case, and the trial court correctly agreed.

The trial court correctly ruled it must defer to the arbitrator both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition'." (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R. pp. 19-22)). Similarly, this Court should not disturb the Arbitrator's findings. Judicial intervention in this case frustrates the purpose of arbitration and Appellant's requests must be denied.

B. The Trial Court Properly Found the Arbitrator Had Authority to Reconsider Her Award and There Was No Finality in the Initial Award.

In the Final Award, the Arbitrator specifically found that there was no finality in the Initial Award. (January 23, 2024, Order (R. pp. 180-206)). The trial court correctly held the Arbitrator acted within her scope and there was no finality in the Initial Award (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R. pp. 19-22)). So long as she retained jurisdiction and

ruled on what was in the scope of the arbitration, she was free to reconsider the evidence and law, alter or change her own non-final awards, withdraw them or vacate them.

An arbitrator exceeds his powers and authority when he attempts to resolve an issue that is not arbitrable because it is **outside the scope of the arbitration agreement**. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, S. Ct. 1358, 4 L. Ed. (2d) 1424 (1960) (emphasis added). Here, the Arbitrator's Final Award resolved the issue that was submitted to arbitration.

To be clear, at the trial court and again here, Appellant takes the irrational position that the Arbitrator was legally precluded from changing her mind about her decision in response to Respondents' Rule 59 motion, despite still having jurisdiction of the matter. (Appellant's February 2, 2024, Motion (R. pp. 207-355)). In Appellant's view, once the Initial Award was sent to the parties, the die was cast for the Arbitrator. Nothing in any applicable rules provides that. An arbitrator, like a court, is free to consider and reconsider arguments and evidence as long as they have jurisdiction and do so in comportment with applicable rules. (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R. pp. 19-22)). The Appellant also contends that the trial court committed reversable error by not enforcing the Initial Award, which the Arbitrator expressly disavowed and vacated.

To accomplish this objective, Appellant takes the unique position that somehow, in determining this action on the merits, the Arbitrator has exceeded her authority under the arbitration provision and Consent Order of this Court, which was filed on August 30, 2017 (R. pp. 1-3), that specifically orders, and **with the consent of all parties**, all portions of this action "shall proceed to binding arbitration." (August 30, 2017, Order.) (R. pp. 1-3.)

The arbitration agreement, and further, the Consent Order Staying Case and Compelling Arbitration, grants the authority and power to the Arbitrator to decide the merits of this case, including procedural matters "**that 'grow out of the dispute,' even where those questions 'bear on its final disposition'**" *Group III Mgmt.* 425 S.C. 141.

Somehow, after drafting the arbitration agreement, consenting to arbitration in this matter, and being dissatisfied with the result after all facts, testimony, and evidence was properly considered, Appellant wants this Court to conclude that the Arbitrator acted outside the powers and authority granted to her, not only by the trial court, but by the **consent of Appellant**. (August 30, 2017, Order.) (R. pp. 1-3.) To allow this type of argument and position completely undermines the purpose of arbitration and would render arbitration pointless, and the trial court correctly found the Arbitrator acted within her right.

Our courts have consistently held that "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Group III Mgmt.* 425 S.C. 141 (quoting *Remmey v. PaineWebber, Inc*, 32 F.3d 143, 146 (4th Cir. 1994). The trial court properly refused to undermine the Arbitrator and act as the "Varsity Team." This Court should do the same.

Respondents submitted a Motion to Reconsider on October 16, 2023. (October 16, 2024, Motion to Reconsider.) (R. pp. 105-120.) Rather than seeking to confirm the preliminary arbitration award, Appellant continued to engage in the arbitration proceedings, continued to submit motions and memoranda, continued to participate in hearings, and continued to submit and consent to the jurisdiction of arbitration. (Appellant's October 30, 2023, Memorandum in Opposition.) (R. pp. 121-143.) The continued argument by counsel for Appellant at this juncture that the Arbitrator lacked authority, or lacked jurisdiction, is disingenuous as Appellant's action

evidence its consent to the Arbitrator's continued assertion and assumption of its jurisdiction of this matter. Any argument that the arbitrator did not have the power to rule on the very issue submitted to her is devoid of logic and must not be considered by this Court.

Further, the trial court properly distinguished *Smith v. Transport Workers Union of America, AFL-CIO Air Transport Local 556*, 374 F.3d 372 (5th Cir. 2004), and Appellant's continued reliance on this case warrants a closer review.

In *Smith*, the Fifth Circuit vacated a modified award because **the arbitration agreement "clearly restricts the authority of the arbitrators to amend or correct their award**." *Id.* The arbitration agreement in *Smith* states that "[t]he arbitrators *sua sponte* may amend or correct their award **within three business days after the award**." *Id.* Here, there is no contractual agreement that restricts modification of an award; therefore, *Smith* has no bearing and should not be persuasive on this Court. Additionally, there is no "modified award" here. (January 23, 2024, Order (R. pp. 180-206)); (October 25, 2024, Order (R. pp. 9-18)); (November 6, 2024, Order (R. pp. 19-22)).

The trial court properly found there was one final award, and the arbitrator acted within her power and scope.

C. Appellant Continues to Attempt to Improperly Relitigate the Merits of this Case.

Most fundamentally, Appellant simply continues to attempt to relitigate the merits of the case as evidence by its arguments at the trial court and its Initial Brief. A motion to vacate or modify an arbitration award is not a chance to relitigate the underlying merits of a case. *Pittmann Mortg. Co v. Edwards*, 327 S.C. 724 88 S.E.2.d 335 (1997), *see also Trident Technical College, supra.* Similarly, an appeal is not an appropriate venue to relitigate the merits of the case.

As evidenced in Appellant's improper and misleading Motion to Vacate the January 23, 2024, Arbitration Award and Motion to Reinstate the October 4, 2023, Arbitration Award, Appellant sought to use that Motion and the trial court to improperly relitigate the merits of this case. (February 2, 2024, Motion.) (R. pp. 207-355.) Appellant continues to make numerous arguments and references to the underlying evidence that was submitted to the Arbitrator (which Respondents contend mischaracterizes the testimony and evidence the Arbitrator heard and considered) and continues to argue that the Arbitrator was wrong in the conclusions reached in the Final Award, which is simply not permitted. '"A party may not attempt to relitigate the merits of the arbitrator's resolution of the arbitrable issues under the guise of questioning the arbitrators' power. *Id.*;'" *Trident Technical College, supra.*

Just like the *Trident Technical College* Court held, here:

> [c]learly, [Appellant] is attempting to relitigate the merits of the arbitration panel's resolution of concededly arbitrable issues under the guise of questioning the panel's power and authority**; <u>this is not proper</u>**. *Amoco Oil Co. v. Oil, Chem. & Atomic Workers Internat. Union*, 548 F. (2d) 1288 (7th Cir. 1977), *cert. denied*, 431 U.S. 905 (1977). Even assuming *arguendo* that the award misconstrued the contracts, this would not constitute an abuse of the arbitrators' power under 9 U.S.C. § 10(d). *National Railroad Passenger Corp. v. Chesapeake & O. Ry. Co.*, 551 F. (2d) 136 (7th Cir. 1977) (emphasis added).

Not only is it not proper to consider these arguments at all, but especially so in this instance, where there is no record of the arbitration proceedings. Without a record, Appellant relies on its counsel's recollection of the testimony and evidence and treats counsel's arguments as evidence. (February 2, 2024, Motion.) (R. pp. 207-355.) Appellant does not and cannot cite to any testimony or evidence in the record presented at the arbitration. Argument of counsel cannot be considered. This is not proper evidence and must be ignored. Appellant's attempts to cite to the record are nothing more than cites to previous arguments and narratives of Appellant's counsel. *See Trivelas*

v. S.C. DOT, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (Howard, J., concurring) ("it is an error of law to base a decision on "deposition testimonies as presented in the arguments of counsel," as was done in this case, unless copies of the deposition testimony are properly filed in the record or the parties have stipulated to the facts.)(internal citations omitted)

Appellant must not be allowed to use this appeal to improperly relitigate the merits of this case and the trial court correctly denied its Motion.

III. The Trial Court Correctly Denied Appellant's Request for Sanctions.

The trial court correctly ruled when it refused to impose sanctions on Respondents. (November 6, 2024, Order.) (R. pp. 19-22.) Appellant continues to wrongfully assert that disclosure by Respondents of Appellant's settlements with its Subcontractor Defendants, is a violation of the South Carolina Rules of ADR, and is worthy of sanctions. Appellant's logic is misguided and non-sensical, and the trial court correctly refused to award sanctions. In making that argument, Appellants wrongly conflates protected settlement discussions (of which Respondents were not even a party and did not disclose) with the non-protected final settlement terms (which Respondents gratuitously received when the settlement between Appellant and its subcontractors was final).

As evidenced by the pleadings, Appellant brought third-party claims against its Subcontractor Defendants. Respondents did not bring any direct actions against any party other than Meritage (*see generally*, Amend. Compl.). (R. pp. 29-34.) Appellant settled its claims with its Subcontractor Defendants, executed the Settlement Agreement (the terms of which Appellant likely drafted and unquestionably agreed to) and filed a Stipulation of Dismissal (July 12, 2023, Stipulation of Dismissal). (R. pp. 76-80.)

Respondents brought no direct claims against the Subcontractor Defendants and were not a party to the Settlement Agreement or the negotiations leading to the settlement between Appellant and its subcontractors. Respondents received ***nothing*** from that settlement. (Exhibit 3 to Respondents March 20, 2024, Memorandum in Opposition to Motion to Vacate). (R. pp. 423-430.)

The dismissal of Appellant's claims against its Subcontractor Defendants is a matter of public record and the Settlement Agreement does not contain any confidentiality provision (which would not be binding on Respondents even if it were, since Respondents were not parties to that agreement). (July 12, 2023, Stipulation of Dismissal.) (R. pp. 76-80.)

"Rule 8 is designed to protect the communications **made during the mediation itself** and to protect the process . . . Further, any confidential matters the parties do not want disclosed can be protected through court proceedings including confidentiality provisions." *Huck v. Oakland Wings, LLC,* No. 5500, 2018 S.C. App. LEXIS 22 (Ct. App. Mar 28, 2018) (emphasis added). Had Appellant wanted to conceal the settlement terms, it could have done so and could have made Respondents parties to that agreement in exchange for some valid consideration, none of which occurred. Further, Appellant could have taken steps to ensure that its non-confidential settlement agreement was not provided to Respondents.

All information disclosed by Respondents is discoverable, and disclosure of that information is neither improper nor sanctionable. If the settlement terms were not relevant or admissible, that is a decision that was within the authority of the Arbitrator to decide, which she did. (Finding, in her Final Order, the following relative to the information regarding the settlement: "[a]t no time during the Arbitration was the Arbitrator aware of any monetary recovery by defendant Meritage against any subcontractors brought in as third-party defendants. Accordingly,

this Order will only reflect the testimony of lay and expert witnesses and evidence presented during arbitration and an analysis of the applicable law." (January 23, 2024, Final Award at p. 2.) (R. p. 181.) The trial court correctly noted that no consideration was given to this information.

Not only that, but it is also common practice for a court (in both jury and nonjury matters), or an arbitrator (like in the present matter), to know of settlements between parties in a case to consider set-off, contribution and other similar issues. In addition, in appropriate circumstances, attorneys routinely tell not just courts, but juries, that certain parties to litigation have settled in order to make what is commonly referred to as "empty chair" arguments. None of Respondents' actions violated any ADR Rule. If sanctions, should be imposed, they should be imposed on Appellants for making an obviously fallacious argument, not once but twice.

As noted above, the Arbitrator expressly held that she did not consider the settlement evidence. (January 23, 2024, Final Award.) (R. pp. 180-206.) Thus, even if the provision of the non-confidential settlement information to the Arbitrator was error, which Respondents deny, it is well settled that South Carolina Courts shall disregard harmless errors. *See* Rule 61, South Carolina Rules of Civil Procedure ("No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

CONCLUSION

In sum, the trial court properly found the Arbitrator was within her right to reconsider her award. Appellant presents no compelling evidence or argument that the Arbitrator ruled on

anything outside of her scope. Further, and more importantly, Appellant cannot (and does not even attempt to) show the trial court abused its discretion. The trial court's order must therefore be affirmed.

Respectfully submitted,

s/Robert T. Lyles, Jr.

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