THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Master-In-Equity

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., Appellant/Respondent,

v.

Concord and Cumberland, LLC, Concord & Cumberland HPR, Leo Hall, Diane Hall, Bea H. Smith, Margaret C. Pope, William D. Foster, Jr., Gene G. Foster, Mattison J. MacGillivray, Teresa MacGillivray, Pamela L. Vaughn, Nelia A. Patricio, Trustee of the Nelia A. Patricio Revocable Trust Agreement, Stuart D. Reeves, Edward T. Strom, Barbara K. Henderson, James R. Clarke, Paul A. Brim, Robert K. Seidl, Jennifer M. Seidl, Robert Kenneth Seidl, II, M. Bert Storey, Thomas R. Mather, Edward T. Strom, 304 Concord & Cumberland, LLC, Marion M. Simpson f/k/a Marion Moore McDonald Simpson, Kathy Gardner, Gregory J. Gardner, Freeman Waterfront Properties, LLC, Jo-Ann Cooper, Betty Y. Segal, Robert M. Levin, and Bonita K. Levin, Donald D. Leonard, Betty L. Beatty, Mattellen, LLC, and Thomas R. Debnam, Trustee of the Trust Agreement of Thomas R. Debnam, Defendants,

Of Which Concord & Cumberland HPR is the Respondent/Appellant.

FINAL BRIEF OF RESPONDENT/APPELLANT

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II. Did the Circuit Court err in failing to vacate the arbitration award when the Panel exceeded its powers by agreeing to issue a "Reasoned Award" but only provided an award steeped in conclusory statements that did nothing but cause confusion and uncertainty with the arbitration process?

III. Did the Circuit Court err in failing to modify the arbitration award when the Panel exceeded its powers by failing to give effect to the Release?

IV. Did the Circuit Court err in failing to modify the arbitration award when the Panel exceeded its powers by allocating a portion of the award to costs incurred on another project, which was not referred to arbitration and was not a part of TCC of Charleston, Inc.'s ("TCC") claim?

STATEMENT OF THE CASE[1]

On June 6, 2016, TCC filed an action against the Concord & Cumberland HPR ("HPR") for (1) foreclosure of mechanic's lien, (2) breach of contract, and (3) quantum meruit. TCC amended the Complaint on June 10, 2016, to add all of the individual condominium unit owners. Contemporaneously with filing the initial Complaint, TCC also filed a Motion to Stay and Compel Arbitration. The HPR answered the Amended Complaint but consented to arbitration pursuant to

[1] The documents related to much of the procedural history contained herein can be found as exhibits to the HPR's Memorandum of Law filed on December 11, 2019. (R. p. 1290-1706).

the terms of the guaranteed maximum price construction contract ("GMP Contract") between the HPR and TCC.

On December 30, 2016, Judge Roger M. Young, Sr. entered a Consent Order staying the court action and allowing arbitration to proceed on the claims between TCC and the HPR. The parties entered into an Arbitration Agreement, dated January 18, 2017, and, on April 19, 2017, the Panel issued Panel Order No. 1, which specified that the form of the award would be a "Reasoned Award."

The merits hearing was conducted on January 21, 22, 23, and 24, 2019. The Parties each submitted proposed orders on or before March 21, 2019, and the Panel issued the Arbitration Award awarding $2,023,074.45 to TCC and delivered it to all parties via email on April 17, 2019. Various post-award motions were submitted by the parties. On June 17, 2019, TCC filed a Motion to Lift Stay in the Circuit Court. On July 12, 2019, the Panel issued its Post Award Order, and, on July 15, 2019, the HPR submitted a Motion to Change Award. In order to preserve its right to judicial review, on July 16, 2019, the HPR also filed a Motion to Vacate the Arbitration Award or, Alternatively, to Modify or Correct the Arbitration Award.

Subsequently, the Panel issued a Corrected Arbitration Award dated August 12, 2019, and served it on all parties on August 19, 2019. The Corrected Arbitration Award withdrew the Post Award Order and amended and supplemented the original Award. The Corrected Arbitration Award awarded $2,016,066.73, plus interest and costs. In response, on September 7, 2019, the HPR submitted a Motion for Change of Corrected Arbitration Award. The Panel issued an Order on the HPR's Motion for Change of Corrected Arbitration Award on October 23, 2019. The October 23, 2019, Order was the last order from the Panel in the underlying arbitration.

On November 18, 2019, the HPR filed a Motion to Vacate the Corrected Arbitration Award or Alternatively, to Modify or Correct the Corrected Arbitration Award in the Circuit Court. Judge Deadra L. Jefferson heard this motion on December 16, 2019. On January 30, 2020, Judge Jefferson issued an Order Granting TCC's Motion to Lift Stay and Denying the HPR's Motions to Vacate or Correct the Panel's Corrected Arbitration Award. On February 10, 2020, the HPR filed a Motion to Reconsider, Alter, or Amend Judgment pursuant to Rule 59, SCRCP, and, on May 1, 2020, Judge Jefferson denied that motion without a hearing.

The HPR appealed Judge Jefferson's orders in Appellate Case No. 2020-000875. Chief Judge James E. Lockemy determined that the appeal was not ripe because Judge Jefferson did not confirm the award when she ruled, notwithstanding the language of S.C. Code Ann. §§ 15-48-120[2], -130(d)[3], and -140(b)[4]. The HPR proceeded to litigate this action before the Circuit Court and, following an order of reference, before the Master-In-Equity, where Judge Scarborough confirmed the award among other rulings. This appeal flows through Judge Scarborough's order confirming the award, but specifically addresses Judge Jefferson's orders dated January 30, 2020, and May 1, 2020.

STATEMENT OF FACTS

This appeal arises from a construction contract payment dispute on a condominium repair project located at 175 Concord Street in Charleston, South Carolina (the "Project"). (R. p. 17). On February 27, 2014, the HPR entered into a GMP Contract with TCC to repair the condominium

[2] S.C. Code Ann. § 15-48-120 ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter 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.").
[3] S.C. Code Ann. § 15-48-130(d) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.").
[4] S.C. Code Ann. § 15-48-140(b) (stating that "[t]he court shall confirm the award as made").

building. (R. p. 28). The HPR was the Project owner, and TCC was the Project's general contractor. (R. p. 17). The contract was a cost plus a fee with a guaranteed maximum price and had an initial value of $3,923,939.00. (R. p. 28). Due to unforeseen conditions, the contract scope, time, and price increased through the change order ("CO") process provided for in the GMP Contract. (R. p. 29). As the Project progressed with the increase in scope, time, and costs, the HPR was kept apprised through a Change Order Log that was provided by TCC to both the HPR representative and architect at the weekly Owner, Architect, Contractor meetings. (R. p. 1751; R. p. 1605, lines 12-17). Among other things, the Change Order Log provided a "Proposed/Forecasted Changes" line item and a "Forecasted Contract Amount" line item. (R. pp. 1801-09).

Utilizing the GMP Contract and CO process, the HPR paid seventeen pay applications, which contained supporting documentation for costs incurred to complete both original scope of work items and additional scope of work items and which were reviewed and certified by the architect. The first seventeen pay applications reflected the additional scope of work items in 9 COs, consisting of 134 proposed change orders ("PCO"), for a total contract sum of $5,877,084.00. (R. p. 17; R. p. 29). The last of the undisputed pay applications, Pay Application No. 17, was submitted by TCC on February 8, 2016, along with the Release, drafted and executed by TCC, at issue in this appeal. (R. p. 1404).

The project reached substantial completion on March 8, 2016. (R. p. 1258). This is the point where all work of the contract is complete, save for completion of punch list items (i.e., completion of items not conforming to contract specifications), and no new work or change orders are added. (R. p. 2625, lines 5-10). Final Completion of the project occurred on March 17, 2016. (R. p. 280; R. p. 468).

This dispute arises solely from Pay Application No. 18. TCC first submitted the Pay Application on March 24, 2016. It included CO 10 and asserted a new total cost claim of $2,385,503.57. (R. p. 1291). These new costs were supported only by a new PCO 139. Rather than relating these new costs to additional scope of work items like previous PCOs, TCC provided only its total job cost ledger and claimed the difference between its alleged total project costs and the amount billed and certified by the architect.

Pay Application No. 18 was, therefore, justifiably a shock to the HPR, even more so after considering its review of the contemporaneous Change Order Log prepared and presented by TCC. (R. pp. 1801-09). Specifically, on February 16, 2016, shortly after Pay Application No. 17, the aforementioned Change Order Log forecasted $0 in changes and contained a "Forecasted Contract Amount" of $6,486,751. (R. pp. 1801-09). Further, on March 9, 2016, one day **after** substantial completion and just fifteen days before Pay Application No. 18 was submitted by TCC, the Change Order Log still forecasted $0 in changes and a "Forecasted Contract Amount" of $6,496,345. (R. pp. 1801-09). Notwithstanding the Change Order Log, and the $0 of forecasted changes to the GMP Contract, on March 24, 2016, TCC submitted Pay Application No. 18 seeking its total costs on the Project, for a total contract sum of $7,514,921.99. (R. p. 1752). Through TCC's additive revisions to Pay Application No. 18 over the next year, this total sum increased to $7,957,021.81. (R. p. 1306).

With Pay Application No. 18, TCC unilaterally sought to turn the GMP Contract into a cost plus contract, without a guaranteed maximum price, and it did so without any effort to document how these newly presented costs derived from additional approved work. TCC's failure to do so essentially left the HPR with the prospect of paying $2 million more for work that TCC had already invoiced and for which the HPR had already paid. (R. p. 1540, lines 7-25; R. p. 1541,

lines 1-7). Further, TCC asserted its total cost claim in Pay Application No. 18 without any supporting amendment to the GMP contract and in complete contravention of the sworn Conditional Release and Waiver of Lien that TCC executed and delivered to the HPR on February 8, 2016, in exchange for the HPR's payment of Pay Application No. 17, which was in fact the final contract document agreed to by the parties. (R. p. 1404).

STANDARD OF REVIEW

South Carolina has a strong policy favoring resolution of disputes through alternative dispute resolution, including arbitration. *See Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) ("Arbitration is a favored method of settling disputes in South Carolina."). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Id.* at 241, 676 S.E.2d at 323. "An award will be vacated only under narrow, limited circumstances, *inter alia*, 'when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.'" *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting *Hart*, 382 S.C. at 241, 676 S.E.2d at 323). The South Carolina Supreme Court has held:

> [F]or a court to vacate an arbitration award based upon an arbitrator's "manifest disregard for the law," the "governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Indeed, "[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. (quoting *Hart*, 382 S.C. at 241-42, 676 S.E.2d at 323) (citation omitted). "For example, an arbitrator has acted in manifest disregard of the law if he 'disregard[s] or modif[ies] unambiguous contract provisions.'" *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006) (alterations in original) (quoting *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001)).

ARGUMENT

The arbitration award and subsequent Order are riddled with mistakes, acknowledged expressly by both the Panel and the Circuit Court, and the result, which consequently reeks of error, can only have been achieved by their manifest disregard of the law. Initially, the first "Reasoned" award contained just two pages of text and little reasoning, and was later revealed to have mistakenly included the amount of Pay Application No. 17 ($648,542.79) in the award as if it had not been paid, when that amount had in fact been fully paid by the HPR and was never part of the dispute. Because it had been paid, the Panel manifestly disregarded the law when it failed to enforce the self-authenticated, uncontested, unambiguous, sworn-to, Conditional Release and Waiver of Lien that accompanied Pay Application No. 17[5]. Further, the Panel improperly based the award, in part, on matters not included in the project or referred to arbitration. When the HPR sought relief from the Circuit Court, the Circuit Court committed error by upholding the Panel's position, particularly given its express reliance on "evidence" identified by TCC for the first time at the hearing of the HPR's motion. As a result, the integrity of this Arbitration process has been sorely lacking. Based on the arguments outlined herein, this Court should reverse the Circuit Court and provide relief to the HPR.

I. THE CIRCUIT COURT FAILED TO VACATE THE ARBITRATION AWARD DESPITE THE PANEL'S MANIFEST DISREGARD OF BASIC CONTRACT LAW.

The Circuit Court erred when it failed to vacate or correct the arbitration award based on the Panel's manifest disregard of a self-authenticated, uncontested, unambiguous Release. The Panel's failure to honor the Release amounts to a manifest disregard of the law because (i) the Release was a clear, unambiguous, and uncontested contract document and (ii) prior oral

[5] The "condition" of the release and lien waiver was payment of Pay Application No. 17.

agreements or actions are not legally capable of rendering the later Release unenforceable. Further, even if parol evidence, such as this, could be used, the inferred basis for failing to enforce the Release (i.e., waiver or estoppel) was manifestly improper as a matter of law.

A. The Release is a Clear, Unambiguous, and, Importantly, Uncontested and Enforceable Contract.

First, the Conditional Release and Waiver of Lien agreement is a contract:

> In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply, "[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

Carolina Amusement Co. v. Conn. Nat. Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting *Benya v. Gamble,* 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984)).

In the Release, the HPR paid, in addition to the sixteen prior payments, "$648,542.79, for materials, labor and services rendered and supplied as of February 8, 2016" in exchange for TCC agreeing to "release and waive all claims and liens existing as of February 8, 2016, against Concord & Cumberland HPR . . . on account of, **or in anyway resulting from**, or in connection with **construction located at 175 Concord St, Charleston, SC**." (R. p. 1404) (emphasis added). In short, TCC offered the release and the HPR accepted it by the payment of $648,542.79 of valuable consideration. TCC concedes that Pay Application No. 17 was paid in full, thus confirming that consideration was sufficient and that the payment condition was satisfied. (R. p. 1405); *cf. Taylor, Cotton & Ridley, Inc. v. Okatie Hotel Grp., LLC*, 372 S.C. 89, 98, 641 S.E.2d 459, 464 (Ct. App. 2007) (affirming "the trial court's finding that Subcontractor's payment application included merely a conditioned waiver 'to be held in trust pending payment'").

Second, the Release was never challenged as being ambiguous, unclear, or executed under duress. The Release was drafted by TCC itself and is a self-authenticating document, as it is sworn

to and notarized by TCC's Project Manager. *See* Rule 902(8), SCRE. There has been, and can be, no dispute that the language of the Release is unambiguous. Unambiguous contracts must be enforced:

> It is . . . a question of law whether the language of a contract is ambiguous. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. **A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully**.

S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (emphasis added) (citations omitted) (enforcing "clear, explicit and unambiguous language" in a lease).

Similarly, unambiguous, voluntarily signed releases must be enforced. *See McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248-49, 612 S.E.2d 462, 465 (Ct. App. 2005) (enforcing a release that "explicitly and unambiguously limited the Range's liability" and that was "voluntarily signed" by Plaintiff).

To ignore an unambiguous, sworn writing, such as this, equates to a manifest disregard of the law. *See, e.g.*, *Patten*, 441 F.3d at 235. To uphold such disregard would create general uncertainty in the enforceability of legal, unambiguous contract documents across all manner of business and industry, and would specifically create serious confusion and uncertainty in the enforceability of release and lien waiver documents that are regularly used to facilitate payments by lenders, owners, and contractors in the construction industry.

B. Prior Oral Agreements Cannot Be Used to Interpret a Later, Clear, Unambiguous, and Uncontested Contract.

Because the Release is a clear and unambiguous contract and there have been no allegations of duress, citation to prior oral agreements as the stated basis to refuse to enforce the later Release disregards long-standing and well-settled contract law. *See, e.g.*, *The Delaware*, 81 U.S. (14 Wall.) 579, 606 (1871) ("Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed."); *see also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) ("'Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.'" (quoting *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011))); *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) ("'The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument.'" (quoting *Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990))); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988) ("When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." (citation omitted)).

In derogation of this clear direction, the Panel engaged in the following tortured analysis to avoid enforcement of the last-in-time, unambiguous Release:

[S]ome of the PCOs and TCC's claims for additional costs were subsequently

> submitted and paid by HPR which arose and existed as of the date of the execution of the Conditional Release and Waiver of Liens. Knowing that TCC had signed Conditional Release and Waiver of Liens, HPR nonetheless agreed to PCOs; signed the Change Orders; and, made payment for claims that may have otherwise been released or barred by the Conditional Release and Waiver of Liens. HPR cannot now claim that the Conditional Release and Waiver of Liens bar TCC's claims.

(R. pp. 1391-92). In short, the Panel cites to the HPR's negotiation and payment of prior change orders, which occurred long before TCC issued Payment Application 17 and the accompanying Release, as the basis for refusing to enforce the later written instrument – the Release. This is a clear disregard of the law. The Release must be enforced according to its terms, "regardless of its wisdom or folly." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

C. Waiver or Estoppel Cannot Be Used to Invalidate the February 8, 2016, Conditional Release and Waiver of Lien.

Waiver cannot invalidate an agreement that does not yet exist. *See Fender v. N.Y. Life Ins. Co.*, 158 S.C. 331, 356, 155 S.E. 577, 586 (1930) ("'The theory of the waiver of the terms of a contract must necessarily presuppose the existence of a valid contract. Unless and until a contract exists between the contracting parties it would seem to be illogical to contend that either party can be said to have waived any of the terms or requirements of the contract.'" (quoting *Jones v. N.Y. Life Ins. Co.*, 253 P. 200, 203 (Utah 1926))). Each Release drafted and executed by TCC and provided with each pay application is its own separate contract, the rights of which are capable of being waived by subsequent actions. As far as the February 8, 2016, Release, it matters not that the HPR may have previously paid invoices submitted after the execution of prior lien waivers for work that was performed before those lien waivers. The HPR took no actions after February 8, 2016, that could be deemed to waive the HPR's rights under the Release.

Furthermore, estoppel, which doctrine was first introduced not by the Panel, but by the

Circuit Court in error, cannot be used to invalidate the Release. Regarding estoppel and contracts, the Supreme Court of South Carolina has stated:

> Simply put, **Respondents cannot use equitable estoppel to let in through the back door what the parol evidence rule prevents from coming in the front door**.
>
> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." However, an unambiguous contract is by definition capable of only one reasonable interpretation. Therefore, a party to an unambiguous contract cannot prove lack of knowledge or the means of acquiring knowledge of the contract's meaning, which bars an equitable estoppel claim in the first instance.

Rodarte v. Univ. of S.C., 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (emphasis added) (citations omitted).

Accordingly, neither waiver nor estoppel is a proper legal basis to decline to enforce the unambiguous and uncontested Release. This Court should find the use of these theories to be a manifest disregard of the law.

D. <u>No Subsequent Agreement Exists That Could Alter or Invalidate the Conditional Release and Waiver of Liens.</u>

Counsel for TCC stated in the motion hearing on December 16, 2019:

> As Your Honor noted, they - - the Panel went into detail as to why these particular arguments were being rejected. They did not disregard the law. **They found that there was a subsequent agreement that controlled and they applied it.** They applied the law.

(R. p. 2661, lines 2-6). This Freudian slip is important because it is TCC acknowledging that the only way the Release can be found unenforceable is through a subsequent agreement stating so. There is no such agreement.

In reality, the Panel, according to TCC's representation, was referencing an email between attorneys for TCC and the HPR, which states: "The HOA, Trident, and GBA will work to diligently

assess and process ongoing payment applications and change order requests, with an understanding that some portions of some of the PCOs may require additional negotiation or compromise at or near the end of the project." (R. p. 1797). This email is dated June 26, 2015, almost eight months **prior** to the February 8, 2016, Release. It refers specifically to "ongoing" issues and then-existing PCOs and certainly cannot be read as an agreement to convert the GMP Contract to a cost-plus contract. At the very best, the email is an agreement to agree, which is not a contract at all. *Trident Constr. Co., Inc. v. Austin Co.*, 272 F. Supp. 2d 566, 575 (D.S.C. 2003) ("[I]n general, 'agreements to agree do not amount to a contract in South Carolina.'" (quoting *Blanton Enters., Inc. v. Burger King Corp.*, 680 F. Supp. 753, 770 n.20 (D.S.C. 1988))); *see also Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) ("South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement."); *Hughes v. Edwards*, 265 S.C. 529, 536, 220 S.E.2d 231, 234 (1975) ("There can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations.").

Accordingly, TCC has represented to the Circuit Court that this email evidenced the prior agreement that invalidated the eight-months subsequent Release at issue. (R. p. 2664, lines 7-11). The Circuit Court initially included reference to this email as an "especially" important basis for upholding the Panel. (R. p. 23). In any event, the fact that the Panel used a prior in time agreement to agree, which is not even a contract, to invalidate a subsequent fully enforceable contract is a clear disregard of the law. The Circuit Court thus erred in failing to vacate the award under S.C. Code Ann. § 15-48-130(a)(3).

II. THE CIRCUIT COURT FAILED TO VACATE THE AWARD EVEN THOUGH THE PANEL EXCEEDED ITS POWERS BY FAILING TO ISSUE THE PROPER FORM OF AWARD.

Panel Order No. 1 required a "Reasoned Award." (R. p. 1358). It states: "Form of Award. The form of the Arbitration award shall be a 'Reasoned Award.'" (R. p. 1358). Yet what was initially issued on April 17, 2019, by the Panel provided scant reasoning, few findings of fact, not a single conclusion of law, and no colorable justification for the amount awarded. (R. pp. 1361-63). Further, the Corrected Arbitration Award failed to remedy the grossly inadequate form of the award and did nothing but cause more confusion and uncertainty with the arbitration process. (R. pp. 1388-96).

When a "Reasoned Award" is agreed on by the parties, the arbitrators' failure to issue a Reasoned Award exceeds their power. *See, e.g.*, *Tully Constr. Co./A.J. Pegno Const. Co., J.V. v. Canam Steel Corp.*, No. 13 Civ. 3037, 2015 WL 906128, at *11-20 (S.D.N.Y. Mar. 2, 2015) (remanding the matter to the arbitrator after a detailed analysis, which concluded that the arbitration agreement required a reasoned award, that the two-page award did not constitute a reasoned award, and that the arbitrator exceeded his power by issuing an improper form of award); *see also Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 813 A.2d 621 (N.J. Super. Ct. Law Div. 2002) ("'[W]hen a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.'" (quoting *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998))). "'[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].'" *Tully Constr. Co.*, 2015 WL 906128, at *15 (quoting *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011)).

In short, the HPR submits that a "Reasoned Award" should refer to the material facts and applicable law and provide an explanation that can be conveyed to, and understood by, the parties to arbitration. In these respects, the initial Arbitration Award was completely lacking, and, in the Corrected Arbitration Award, the finding of another agreement separate from the GMP Contract and the Release, without identifying it or any basis for its enforceability, does not qualify as reasoned. To the contrary, such a finding is merely conclusory.

As further evidence that the Panel's awards were conclusory and lacked reason, the Court need look no further than the procedural history of the case and the underlying arguments. Specifically, after the HPR challenged the initial Arbitration Award by pointing out that it was not a Reasoned Award, and after the exchange of post-hearing motions, the Panel issued a Post Award Order which revealed that the award was calculated, in part, by including the amount of Pay Application No. 17. (R. p. 1369). When the HPR informed the Panel, by motion, that Pay Application No. 17 was fully paid and was not part of this dispute, the Panel, rather than simply subtracting from the award the amount of Pay Application No. 17, changed its reasoning and awarded, for the first time, a previously unawarded PCO to reach an amount similar to the value of the previously referenced Pay Application No. 17.

Given these errors, one cannot help but conclude that the form issued by the Panel was intentionally vague and unreasoned. It is well known that the shorter, simpler form of an arbitration award removes the primary bases upon which an attempt to vacate the award can be founded: inaccurate arbitral findings of fact, incorrect interpretations or applications of relevant law or contract language, or both. Thus, when arbitrators do not provide substantive written

awards revealing the rationale of their decision, judicial vacation of the award is virtually precluded. *See* 3 Ian R. MacNeil et al., *Federal Arbitration Law* § 37.4.1, at 37:12 (Supp. 1996) ("It is often said that the absence of a written rationale insulates the award from judicial review . . . .").

The parties agreed to and requested a "Reasoned Award." The parties paid for a "Reasoned Award." And the Panel agreed that it would issue a "Reasoned Award." The Panel failed to do so and thereby exceeded its power. The Circuit Court then erred in failing to vacate the award under S.C. Code Ann. § 15-48-130(a)(3).

III. THE CIRCUIT COURT FAILED TO MODIFY THE ARBITRATION AWARD EVEN THOUGH THE AWARD CONTAINED COSTS INCURRED PRIOR TO FEBRUARY 8, 2016 AND MONIES ALLOCATED FOR WORK THAT WAS NOT PART OF THE PROJECT AND WAS NOT REFERRED TO ARBITRATION.

The Circuit Court erred when it failed to modify the award to remove (1) all costs awarded for work prior to February 8, 2016, and (2) monies allocated to the stone tower that were not associated with this Project.

A. The Award Should Be Modified to Remove Costs Incurred Prior to February 8, 2016.

TCC executed the Release on February 8, 2016, in conjunction with Pay Application No. 17, which the HPR paid, as described above. As an alternative to vacatur, the Circuit Court should have enforced the February 8, 2016, Release and reduced the award by the value of all costs TCC claims to have incurred prior to February 8, 2016, but which TCC did not present in or through Pay Application No. 17. Despite the Release, the Panel wrongly awarded these costs, and the Circuit Court refused to correct the error. Taking into consideration the Release, the award would

amount to approximately $414,078.71,[6] plus costs incurred by TCC after February 8, 2016, that were included in the "disputed amount" referenced by the Corrected Arbitration Award. (R. p. 1372). In the alternative to correction, this Court should remand to the Circuit Court or the Panel for further findings on the costs to be awarded upon enforcement of the Release.

B. <u>The Award Should Be Modified to Remove Stone Tower Costs.</u>

The Corrected Arbitration Award, in part, is based upon matters not submitted to the Panel. *See* S.C. Code Ann. § 15-48-140(a)(2) ("[T]he court shall modify or correct the award where . . . [t]he arbitrators have awarded upon a matter not submitted to them . . . ."). The Corrected Arbitration Award includes amounts allocated to the stone tower. The initial Arbitration Award did not include any itemized amounts. The entire universe of this dispute is encompassed in Change Order 10 accompanying Pay Application No. 18, as testified to by Mr. Griffith.

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Q. Change order 10 was presented with the final pay application, correct?
A. With one of them, yes. I think it's been revised. I'm sorry I keep repeating.
Q. The first change order 10 was submitted with the first final pay application, correct?
A. I would have to look. I think so. Yes, sir.
Q. That's the universe of this dispute, correct?
A. That's the universal of the dispute, yes, sir. I think the one you're looking at is actually the second one.
Q. Correct me if I'm wrong, and I apologize for not having the series, but the first change order 10 attached as its support a total job cost ledger, correct?
A. I believe so. Yes.

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[6] This sum results from the addition to the undisputed contract sum of the retainage and costs reflected in PCOs 143 and 144 and incurred after February 8, 2016. Notably, all of the costs associated with PCO 146 were incurred prior to February 8, 2016.

Q. Without reference in it to particular PCOs, correct?
A. Correct. I believe so.

(R. p. 1540, lines 7-25; R. p. 1541, lines 1-3).

The stone tower costs have never been included in any version of PCO 139, CO 10, Pay Application No. 18, TCC's Mechanic's Lien, the Complaint, or the Amended Complaint. A claim for such costs was never referred to arbitration. The claim arose for the first time in TCC's pre-hearing brief. Even there, TCC agreed that any costs or expenses associated with the stone tower fell outside the project, which is the scope of this dispute – "Trident asks an additional $29,000 because Trident was asked to assist with the leaking in the stone tower **after the project was complete**." (R. p. 1706) (emphasis added). This was the first request for any amounts for the stone tower, and this request cites no authority. The stone tower work was not included in the scope of the project. TCC was at the building to assist investigation of a wholly separate condition. The investigation work is simply a different project that was not part of TCC's claim. This work was not the subject of any testimony or authenticated evidence at the hearing. There is no evidence to suggest that the stone tower claim was actually served upon or delivered to the HPR for payment, and the claim was never the subject of any discovery. As the matter was not submitted either to the Court or on to the Panel, and the HPR was not on notice of it, any portion of the Award based thereon must be removed. The Circuit Court's error to remove the stone tower costs from the Award should be reversed pursuant to S.C. Code Ann. § 15-48-140(a)(2).

CONCLUSION

For the reasons stated above, the HPR respectfully requests that the Court reverse the ruling below and remand with instructions to the Circuit Court to enter an Order vacating the Arbitration Award. In the alternative, the HPR requests that the Court reverse the ruling below and remand

with instructions that the Circuit Court modify the Arbitration Award by enforcing the Release, recalculating the award, and removing the stone tower costs.

Respectfully submitted this 29th day of December 2021.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Master-In-Equity

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., Appellant/Respondent,

v.

Concord and Cumberland, LLC, Concord & Cumberland HPR, Leo Hall, Diane Hall, Bea H. Smith, Margaret C. Pope, William D. Foster, Jr., Gene G. Foster, Mattison J. MacGillivray, Teresa MacGillivray, Pamela L. Vaughn, Nelia A. Patricio, Trustee of the Nelia A. Patricio Revocable Trust Agreement, Stuart D. Reeves, Edward T. Strom, Barbara K. Henderson, James R. Clarke, Paul A. Brim, Robert K. Seidl, Jennifer M. Seidl, Robert Kenneth Seidl, II, M. Bert Storey, Thomas R. Mather, Edward T. Strom, 304 Concord & Cumberland, LLC, Marion M. Simpson f/k/a Marion Moore McDonald Simpson, Kathy Gardner, Gregory J. Gardner, Freeman Waterfront Properties, LLC, Jo-Ann Cooper, Betty Y. Segal, Robert M. Levin, and Bonita K. Levin, Donald D. Leonard, Betty L. Beatty, Mattellen, LLC, and Thomas R. Debnam, Trustee of the Trust Agreement of Thomas R. Debnam, Respondents,

Of Which Concord & Cumberland HPR is the Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant as the Respondent/Appellant complies with Rule 211(b), SCACR.

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December 29, 2021
Charleston, South Carolina