THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
William P. Keesley, Circuit Court Judge

Op. No. 4826 (S.C. Ct. App. refiled June 23, 2011)

C-Sculptures, LLC, ... Respondent,

v.

Gregory A. Brown and Kerry W. Brown,. ..... Petitioners.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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RULES

Gregory A. Brown and Kerry W. Brown ("Owners") stand by the arguments they made in their Petition for Writ of Certiorari. Owners file this brief Reply pursuant to Rule 242(g), SCACR, however, to address the Return filed by C-Sculptures ("Contractor").

Contractor cites to *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320 (2009), purportedly in support of its contention that the grounds Owners raised in the Petition "constitute only, at most, mere errors of law which are insufficient under the 'manifest disregard' standard." (Return, first sentence). *Gissel*, however, actually supports Owners' contention that the Arbitrator manifestly disregarded the law in this case. That law, S.C. Code Ann. § 40-11-370 (C), instructs "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." (Emphasis added). In *Gissel*, this Court stated "[a]n arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." The Court added that "for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323, citing to *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985). Owners pointed out that the law at issue is well defined, explicit and clearly applicable to this case, and Contractor does not dispute that point in its Return. The Arbitrator did not merely misapply or misconstrue the law, rather, the Arbitrator refused to apply this unambiguous statute. There cannot be a more clear example of manifest disregard of a clearly applicable, well defined law than occurred in this case.

Contractor next cites to *Trident Technical College* for the rule that "[a]n arbitration award is conclusive and courts will refuse to review the merits of an award." (Return, second sentence). What the Court actually said was "[g]enerally speaking, an award within the scope of submission is conclusive on fact issues and interpretation of law." Owners are not challenging the "merits" of the award or the interpretation of the law; instead Owners are challenging the Arbitrator's manifest disregard of the applicable law, and the Arbitrator's unfair application of the "prevailing party" statute. *Trident Technical College* is inapposite to these challenges.

Contractor also cites to language from *Trident Technical College*, which quotes from *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 261 F. Supp. 832 (D.C. N.J. 1966) for the statement "otherwise an arbitration award would signify 'the *commencement*, not the end, of litigation." (Return, third sentence). What the New Jersey District Court actually said was as follows:

> 'The law favors arbitration and it has long been an accepted principle of law, with respect to review by a court of an arbitration award, that there exists strong presumption favoring the validity of the award. *Burchell v. Marsh*, 17 How. 344, 58 U.S. 344, 350, 15 L. Ed. 96 [(1854)].' *Nickals v. Ohio Farmers Insurance Company*, 237 F. Supp. 904, 906 (N.D. Calif.1965).
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> If the above quotation were not the state of the law, then there would merely be a substitution of the Court's judgment in place of the judgment of the arbitrators chosen by the parties. This would make an award the commencement, not the end, of litigation.

261 F. Supp. at 835. Hence, the District Court resisted second guessing the merits of the award, that is, the judgment of the arbitrator. The Court did not adopt a rule that it could not review of the award for manifest disregard of the applicable law.

In context, then, the *Trident Technical College* Court applied the rule in response to a request that the Court review the merits of the award in that case. This is evidenced by the fact that the Court cited to the rule immediately following its recitation of the following rule from *Newark Stereotypers' Union*: "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award." The Court did not state that it would not review the award for manifest disregard of the law.

Contractor also states "It is time for the instant action to end." (Return, fourth sentence). Owners agree. It is time for the action to end, and it should end with a reversal of the Arbitrator's denial of Owners' motion to dismiss under the explicit, unambiguous, and clearly applicable provisions of the door-closing statute. It should end with a reversal and a remand for entry of an order dismissing the case because Contractor did not have a valid builder's license and should not have been permitted to proceed with the matter.

Finally, Owners would point out that Contractor took no position as to Owners' assertion that the Arbitrator unfairly applied the "prevailing party" statute under the facts of this case. Even though Owners told Contractor, repeatedly, that its claim was vastly inflated, and did not account for valid offsets Owners were due, Contractor failed and refused to reduce the amount it claimed until the first day of the arbitration hearing. This was not a misconstruction or misapplication of the plain language of the statute, rather, it was a disregard of the procedure set forth therein. The Arbitrator allowed Contractor to sandbag Owners and then to ambush Owners at the hearing. Owners contended in their Petition that this procedure was fundamentally unfair and not contemplated by the statutory scheme. Contractor's Return is silent in responding to this argument.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Court should grant this Petition, issue a writ of certiorari, review this matter, and reverse the published decision of the Court of Appeals. The Court should then reverse the Circuit Court's decision which upheld the Arbitrator's award, and should remand the matter for the Circuit Court to enter an order reversing the Arbitrator's award and dismissing the action with prejudice. The Court should in the least reverse the award of attorney's fees in this matter upon a finding that the Arbitrator manifestly disregarded the "prevailing party" statute in finding Contractor entitled to an award of fees and costs under the facts and circumstances of this case.

Respectfully submitted,

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