

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2012-213361
Circuit Court Case No. 2008-CP-27-695

Ralph Thomas and Nancy Thomas,..... Respondents,

v.

Gulf Stream Coach, Inc. and Ridgeland Recreational Vehicles, Inc.,
d/b/a Boat-N-RV Megastore,..... Defendants,

of which

Gulf Stream Coach, Inc., is the..... Appellant,

and

Ridgeland Recreational Vehicles, Inc., d/b/a Boat-N-RV Megastore
is a..... Respondent.

RETURN BRIEF OF
RESPONDENT BOAT-N-RV MEGASTORE.

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STATEMENT OF ISSUE

Does the record indicate that the arbitrator knowingly disregarded well-defined, explicit, controlling law that is unambiguously applicable to the evidence presented to him?

STATEMENT OF THE CASE

I. Factual Background

This case arose out of alleged defects in a recreational vehicle manufactured by Gulfstream Coach, Inc., and sold to the Thomases by Boat-N-RV. The Thomases purchased their vehicle in April 2008. (R. p. 147, Sales Agreement.) At the time of the sale, the Thomases identified various issues with the vehicle that needed to be, and were, corrected prior to their taking possession. (R. p. 149, Verbal Agreement.)

Despite Boat-N-RV's repairs to the coach, additional issues with water intrusion emerged. The Thomases, however, never notified Boat-N-RV of these issues; indeed, Boat-N-RV was not aware of any remaining problems with the coach after making some minor repairs in June 2008. (R. p. 26, Am. Order of the Arbitrator.)

Rather than bringing these water-intrusion issues to Boat-N-RV, the Thomases contacted Gulfstream, the coach's manufacturer and warrantor, about correcting the defects. (R. p. 18, *id.*) In July 2008, the Thomases attempted to return the vehicle to Gulfstream's facilities in Indiana, but Gulfstream declined. (R. p. 24, *id.*) Instead, Gulfstream directed the Thomases to take their coach to the Bill Plemmons dealership in North Carolina for repairs. (R. p. 19, *id.*) The Plemmons dealership was "an authorized repair agent for Gulf Stream," and it had the Thomases' coach from August until mid-October 2008 for repairs. (*Id.*)

Even after Gulfstream directed the Plemmons dealership to repair the vehicle, the water-intrusion problems persisted. In fact, a "video tape taken after the Plemmons repair showed the Plaintiffs vacuuming at least a gallon of water out of the carpet of the RV." (*Id.*)

II. Procedural History

The Thomases filed suit against Gulfstream and Boat-N-RV in the Jasper County Court of Common Pleas on November 6, 2008, alleging breach of warranties against both defendants. (R. pp. 37–38, Compl.) One year later, the Thomases amended the complaint to add claims against Boat-N-RV: an alleged violation of the South Carolina Unfair Trade Practices Act; an alleged violation of the South Carolina Manufacturers, Distributors, and Dealers Act; and fraud. (R. pp. 62–66, Am. Compl.)¹ By consent order dated September 9, 2011, Judge Mullen compelled the suit to arbitration. (R. p. 2, Consent Arbitration Agreement & Order.)

The parties arbitrated their dispute on December 5 and 6, 2011, before Jon L. Austen, Esq., of the Pratt-Thomas Walker firm in Charleston. (R. p. 7, Order of the Arbitrator.) There is no recording of those proceedings. On December 12, 2011, the arbitrator entered an order resolving the arbitration on its merits. (*Id.*) After the Thomases identified issues in that order that required clarification, the arbitrator entered an amended order. (R. p. 17, Am. Order of the Arbitrator.)

Based on the evidence presented, the arbitrator found that both Gulfstream and Boat-N-RV bore some responsibility for the Thomases' actual damages, but that Boat-N-RV could not be held responsible for damages that were neither foreseeable nor known to it. (R. p. 26, *id.*) Similarly, the arbitrator held that "Gulf Stream, as the manufacturer, was in the best position to cure any defects with the RV, but its ongoing failure to adequately cure the defects and perform its warranty responsibilities caused the Plaintiffs

¹ At the close of the merits hearing, the Thomases voluntarily withdrew their claims of fraud and a violation of the Unfair Trade Practices Act, and they added a claim for revocation of acceptance.

to incur damages up to the date of this order.” (R. p. 27, *id.*) Accordingly, the arbitrator ordered the defendants to reimburse the Thomases for the RV: Boat-N-RV was liable for \$18,000, and Gulfstream was liable for the remaining \$275,766.22. The arbitrator also ordered Gulfstream to assume the Thomases’ monthly payments on the coach, to take title to the coach, and to retrieve the coach at its own expense. (R. pp. 25–27, *id.*)

The arbitrator entered the amended order on February 2, 2012. Gulfstream moved the circuit court for an order amending or vacating the arbitrator’s award. (R. p. 88, Pet. to Vacate, Correct and/or Modify Award.) Neither the Thomases nor Boat-N-RV requested that the circuit court modify or vacate the arbitrator’s decision.²

On June 13, 2012, Judge Mullen heard oral arguments regarding Gulfstream’s motion to amend or vacate the arbitrator’s award. By order filed on June 29, 2012, Judge Mullen denied Gulfstream’s motion. (R. p. 28, Order.) Gulfstream sought reconsideration of that ruling on July 10, 2012, and that motion was denied via a form order filed on October 12, 2012. (R. p. 103, Gulfstream’s Motion for Reconsideration; R. p. 34, Form 4 Order.)

Gulfstream filed a notice of appeal of the circuit court’s orders denying its motion to amend or vacate the arbitrator’s ruling on November 2, 2012. (R. p. 118, Notice of Appeal.)

² Because the Thomases did not appeal the arbitrator’s ruling with respect to Boat-N-RV, his decision to limit Boat-N-RV’s liability to \$18,000 is the law of the case. *See, e.g., Ulmer v. Ulmer*, 369 S.C. 486, 490–91, 632 S.E.2d 858, 861 (2006) (“A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.’ Therefore, even where the error has been preserved at the trial level, the party must make timely service of the notice of appeal to present the issue to the appellate court for review.” (quoting *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004))).

STANDARD OF REVIEW

Gulfstream's appeal amounts to a challenge to the results of an arbitrator's ruling. In South Carolina, "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). Accordingly, an arbitrator's award can be vacated only under narrow circumstances, such as when the ruling was procured by fraud, the arbitrator has been corrupted, or the arbitrator exceeded his or her power. S.C. Code Ann. § 15-48-130(a).

In this regard, an error of law in an arbitrator's award cannot serve as a basis for reversal. *See Gissel*, 382 S.C. at 241, 676 S.E.2d at 323 ("Case law presupposes something beyond a mere error in construing or applying the law."). So established is this rule that the South Carolina Uniform Arbitration Act specifically provides that "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." S.C. Code Ann. § 15-48-130(a).

Only when an arbitrator exhibits a "manifest disregard or perverse misconstruction" of the law is his or her decision subject to review by a court. *Lauro v. Visnapuu*, 351 S.C. 507, 519, 570 S.E.2d 551, 557 (Ct. App. 2002). This high standard is met when an arbitrator is aware of, yet refuses to apply, a governing legal principle ***and*** that legal principle was "well defined, explicit, and clearly applicable to the case." *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). The South Carolina Supreme Court has noted that such circumstances are "exceedingly rare." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 108, 333 S.E.2d 781, 787 (1985). This case is not one of these "exceedingly rare" instances, as explained below.

ARGUMENTS AND AUTHORITIES

I. There is nothing in the record to suggest that the arbitrator consciously ignored controlling law.

When an appellant challenges an arbitrator's ruling on grounds that the arbitrator "manifestly disregarded" the law, the focus of the appeal must be on "the conduct of the arbitrator." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. In this regard, the appellant must demonstrate that "the arbitrator knew of a governing legal principle yet refused to apply it." *Id.* (citing *Weimer*, 364 S.C. at 80–81, 610 S.E.2d at 852).

There is absolutely nothing in the record that would support such an allegation against the arbitrator here. To be sure, the record does not indicate that Gulfstream even made any of the arguments on which it bases its appeal to the arbitrator before he entered judgment. There is no prejudgment motion, or even an email or a letter, to the arbitrator setting forth Gulfstream's arguments. Nor is there any recording or transcription of the arbitration proceedings to reflect that Gulfstream ever raised the arguments it now claims warrant reversal. *See Nowlin v. Gen. Tel. Co.*, 310 S.C. 183, 187, 426 S.E.2d 114, 116 (Ct. App. 1992) (rejecting an appellant's arguments because "there is no transcript of the summary judgment hearing and no mention of this argument in the trial judge's order" to demonstrate that the issue had been properly preserved, and explaining that the burden to present an adequate appellate record lies with the appellant), *aff'd*, 314 S.C. 352, 444 S.E.2d 508 (1994).

According to the record, the first time Gulfstream raised its argument that the absence of a contractual relationship between the Thomases and itself bars recovery against Gulfstream—which is not correct, as explained below in Section II—was in a post-judgment motion to vacate or amend the arbitration order that Gulfstream filed with

the circuit court. (R. p. 88, Pet. to Vacate, Correct and/or Modify Award.) But raising an issue after judgment has been entered, of course, is too late. *See, e.g., RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (“[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to judgment but was not.”), *aff’d*, 381 S.C. 490, 674 S.E.2d 170 (2009); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.”).³ Because Gulfstream failed to preserve the issues argued in its opening brief for appellate review, its appeal should fail for this fundamental, threshold reason.

Not only is Gulfstream’s failure to raise its arguments to the arbitrator fatal from an issue-preservation perspective, it cripples Gulfstream’s ability to carry its burden of proving that the arbitrator consciously disregarded controlling law. Certainly Gulfstream cannot demonstrate that the arbitrator “ignored” Gulfstream’s arguments or that the arbitrator “knew of a governing legal principle yet refused to apply it” when Gulfstream cannot show that it ever presented those arguments to the arbitrator in the first place. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323–24. Because the record does not indicate that the arbitrator knowingly ignored a well-established, clearly-governing legal principle when ruling against Gulfstream, the judgment below should be affirmed.

³ The requirements of issue preservation apply equally to proceedings before an arbitrator as they do to proceedings before a circuit court. *See, e.g., Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 719 (Tex. App. 2012) (holding that “our rules for preserving complaints for appeal will also apply to our review of arbitration awards” because the judicial-economy goals served by the issue-preservation requirements are equally present when reviewing arbitration or judicial proceedings).

II. The arbitrator's ruling was consistent with the governing law and evidence presented.

In addition to being unpreserved for this Court's review, Gulfstream's argument on appeal is incorrect on its merits. According to Gulfstream, there is no contractual relationship between it and the Thomases and, therefore, no contractual remedy can lie against it. (Br. of Appellant at 12–18.) But there is no dispute that Gulfstream issued the Thomases a limited warranty with their coach that, in the arbitrator's view of the evidence, failed of its essential purpose. Once he made that factual finding, the arbitrator was authorized to award the remedies that he did against Gulfstream. His judgment should be affirmed accordingly.

A. A contract existed between Gulfstream and the Thomases.

First, there is a contractual relationship between Gulfstream and the Thomases. Gulfstream actually admitted as much in its opening brief when it discussed at some length the express warranty that it issued to the Thomases in conjunction with their purchase of the coach: “There was no dispute, in testimony presented during the arbitration or otherwise, that the manufacturer Gulf Stream Coach Inc.’s Limited Warranty applied to the [sales] transaction.” (*Id.* at 8.) In fact, the sales contract unambiguously incorporated Gulfstream's warranty as a term of the sale. (R. p. 148, Sales Agreement.)

Because Gulfstream's warranty was a material part of the sales contract, the arbitrator concluded that Gulfstream was effectively a party to the sale:

I find that Plaintiffs, the dealer and manufacturer were all parties to the contract of sale. Gulfstream authorized their dealer, Boat N RV Mega Store, to issue the warranty which was part of the contract of sale with the Plaintiffs.

(R. p. 24, Am. Order of the Arbitrator.) Accordingly, the Court should not credit Gulfstream's argument that the arbitrator "skipped over the obvious problem that there is no contract between Gulfstream and the Thomases." (Br. of Appellant at 15.) Not only did the arbitrator not "skip over" the issue, he made a specific finding on the point that completely rebuts Gulfstream's appellate arguments.

B. The arbitrator's ruling that Gulfstream's limited warranty failed of its essential purpose is supported by evidence.

Gulfstream also challenges the arbitrator's award on grounds that the arbitrator improperly found that Gulfstream's "limited warranty failed in its essential purpose so as to deprive the Plaintiffs of the substantial value of the bargain." (R. p. 23, Am. Order of the Arbitrator.) According to Gulfstream, there was "no testimony" regarding whether there had been unreasonable delays in making repairs to the coach or whether the coach could even be repaired. (Br. of Appellant at 14.) The arbitrator's order, however, unambiguously states otherwise.

According to the order, evidence was presented that: the coach's water-intrusion issues "persisted despite repeated repair attempts" (R. p. 18, Am. Order of the Arbitrator); Gulfstream directed the Thomases "to go to a North Carolina repair facility run by Bill Plemmons" to fix the leaks (R. p. 19, *id.*); the problems continued even after the Thomases took the coach to the Plemmons dealership (*id.*); the Thomases attempted to return the coach to Gulfstream's facility in Indiana, but their efforts to revoke acceptance of the coach were rebuffed (R. p. 24, *id.*); and "[t]he RV in its current condition is worthless to the Plaintiffs" (R. p. 23, *id.*).

This is ample evidence to support the arbitrator's holding that Gulfstream's limited warranty failed of its essential purpose. *See Myrtle Beach Pipeline Corp. v.*

Emerson Elec. Co., 843 F. Supp. 1027, 1043 (D.S.C. 1993) (explaining that a “limited remedy of repair or replacement fails of its essential purpose” when the defective product cannot be repaired or when there is unreasonable delay in making the repairs), *aff’d*, 46 F.3d 1125 (4th Cir. 1995). Accordingly, Gulfstream’s argument should fail.

C. Once Gulfstream’s warranty had failed of its essential purpose, the arbitrator rightly applied the remedy of revocation of acceptance.

A finding that a limited warranty has failed of its essential purpose allows an aggrieved party to “seek other remedies, including revocation of acceptance.” *Herring v. Home Depot, Inc.*, 350 S.C. 373, 378, 565 S.E.2d 773, 776 (Ct. App. 2002). This is precisely what the arbitrator ordered here, as he directed Gulfstream to repossess and take title to the coach and to refund the Thomases their monies associated with the coach, with Boat-N-RV bearing a portion of the payment responsibility. (R. pp. 25–27, Am. Order of the Arbitrator.)

On appeal, Gulfstream argues that the only remedy that can lie against a manufacturer under these circumstances “should have been the cost to repair or replace” the defective product, rather than revocation of acceptance. (Br. of Appellant at 18.) In support of this argument, Gulfstream cites *Odom v. Ford Motor Company*, 230 S.C. 320, 95 S.E.2d 601 (1956). But *Odom* only addressed the general rule that breach of an implied warranty typically cannot run against a manufacturer when the product has been purchased from a “remote vendee.” *Id.* at 325, 95 S.E.2d at 603–04.

Here, though, the arbitrator found that Gulfstream’s express limited warranty had failed of its essential purpose. (R. p. 23, Am. Order of the Arbitrator.) When a limited warranty fails of its essential purpose, a buyer may revoke his or her acceptance of the nonconforming good. *Herring*, 350 S.C. at 378, 565 S.E.2d at 776.

Nor is there any South Carolina authority to suggest that revocation of acceptance cannot run against a manufacturer. Gulfstream certainly has not identified any, and case law from around the country fully supports the arbitrator's reasoning on this issue.

For instance, in *Erickson v. Newmar Corp.*, Case Nos. 98-16275 & 98-16276, 2000 U.S. App. LEXIS 18780, at *4-5 (9th Cir. July 26, 2000), the Ninth Circuit affirmed an RV purchaser's revocation of acceptance as to the coach's manufacturer, rather than the seller. The *Erickson* court reasoned:

In our opinion, Nevada would say that a manufacturer which issues a warranty on a big ticket item, like a motor home, is something akin to a joint seller. Certainly buyers can be expected to rely heavily upon the warranty when making a purchase decision, as the manufacturers expect them to do. Nevada would allow the revocation against the manufacturer. The district court did not err.

Id. at *5. This position has been adopted by numerous other courts. *See, e.g., Volkswagen of Am., Inc. v. Novak*, 418 So. 2d 801, 804 (Miss. 1982) (holding that revocation of acceptance was available as a remedy against a car manufacturer because “the retailer’s sales contract, accompanied by the manufacturer’s warranty, are so closely linked both in time of delivery and subject matter, that they blended into a single unit at the time of sale”); *Gochey v. Bombardier, Inc.*, 572 A.2d 921, 923 (Vt. 1990) (“We hold that revocation is available as a remedy against a manufacturer whose product comes with an express warranty that is passed on to the consumer by the seller at the time of the sale, and which product later proves to have substantial defects that continue to exist after a reasonable number of repair attempts.”).

In order for the Court to vacate the arbitrator's order, it must find that he knowingly disregarded law that was “well defined, explicit, and clearly applicable to the

case.” *Weimer*, 364 S.C. at 80, 610 S.E.2d at 852. The existence of this bulk of case law that supports the arbitrator’s ruling, coupled with the absence of any South Carolina that is directly contrary to it, necessarily pushes this case beyond this Court’s boundaries for reversing an arbitrator’s judgment. *See id.* at 81, 610 S.E.2d at 852 (“The parties’ vigorous debate regarding which defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.”). The Court should reject Gulfstream’s appeal accordingly.

CONCLUSION

Gulfstream’s appeal fails for two fundamental reasons. First, it failed to preserve the issues on which it seeks reversal of the arbitrator’s judgment. Second, even if Gulfstream had properly preserved its arguments for this Court’s review, the arbitrator’s rulings do not show a “manifest disregard” for the law; to the contrary, his judgment is consistent with and is supported by the law and evidence presented below. Accordingly, Boat-N-RV respectfully submits that the Court should affirm the arbitrator’s judgment and, similarly, the circuit court’s orders affirming that judgment.

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Respectfully submitted,

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The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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