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.

FINAL BRIEF OF RESPONDENTS RALPH THOMAS AND NANCY THOMAS

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STATEMENT OF THE ISSUE ON APPEAL

Did the trial court err in refusing to vacate the arbitrator's award when Appellant Gulf Stream failed to failed to preserve the issues it now raises, failed to present any evidence that the arbitrator knowingly and manifestly disregarded the law, and when the arbitrator in fact correctly applied the law to the facts and evidence presented to him?

STATEMENT OF THE FACTS

On April 9, 2008, Ralph and Carolyn Thomas purchased a 2007 Friendship G8 recreational vehicle (hereinafter, the "RV") from Ridgeland Recreational Vehicles, Inc. d/b/a Boat N RV Megastore (hereinafter, "BNRV") in Ridgeland, S.C. (R. pp. 37-38). The RV was manufactured by Gulf Stream Coach, Inc. (hereinafter, "Gulf Stream"). (Id.) The total purchase price for the Friendship G8 was $266,382.00. (R. pp. 144-148). The Thomases received $89,500.00 in trade credit, paid a cash advance of $10,000.00, and financed the remaining balance, leaving the financing total at $215,579.00. (Id.)

At the early walk-through and pre-delivery stage of the purchase process the Thomases and representatives of BNRV completed a "Verbal Agreement" which listed numerous problems, concerns, and repairs to be performed prior to acceptance of the RV. (R. pp. 149-150). This April 9, 2008, document indicates the front fog lamps had water damage and "front driver door compartment leaking water/ gasket probably bad." (Id.) The same document indicates the gasket and fog lenses would be replaced. (Id.)

The Thomases took possession of their RV in May of 2008 and immediately began to encounter numerous problems with the RV, the most significant being water intrusion into the RV. (R. pp. 207-265). The Thomases promptly notified BNRV of these issues. Records indicate that as early as June 4, 2008, the Thomases notified BNRV of significant leaking problems in the RV. (R. pp. 160-162). The leaking was so bad that despite the Thomases' uncontroverted efforts at maintaining and cleaning the RV, significant amounts of mushrooms and mold were growing within the RV. (Id.; R. pp. 207-265). BNRV undertook multiple attempts to repair the Thomases' RV, but due to the problems not being fixed, at the direction of BNRV, the Thomases contacted Gulf

Stream as manufacturer for aid with the repairs under the warranties. (R. p. 8). In fact, the paperwork accompanying the RV indicated to do so in the event of problems with the RV. (R. pp. 151 – 153; pp. 160-162; and, pp. 166-167). As a result of the Thomases' contact with Gulf Stream, the Thomases were instructed by Gulf Stream to take their RV to Rural Hall, North Carolina for attempted repairs by an authorized repair shop. The Thomases took the RV to North Carolina in August of 2008 and it remained there through October of 2008. Once the RV was returned to the Thomases, the water intrusion issues continued. (R. p. 8). The months long repairs were unsuccessful. (Id.) A video taken after the RV's return from North Carolina shows the Thomases using a shop vacuum to remove at least a gallon of water from the carpets and front compartment of the RV. (Id.; Exhibit 21 (Omitted from Record on Appeal by Appellant)).

Throughout the appeal process and to this day the Thomases continue to possess and to maintain the defective, faulty, and unusable RV for which they paid nearly $300,000.00. The Thomases continue to make payments on the loan, to regularly maintain the RV, and to maintain insurance on the RV.

STATEMENT OF THE CASE

On November 6, 2008, Ralph Thomas and Nancy Thomas (hereinafter, the "Thomases") filed suit against Gulf Stream Coach, Inc. (hereinafter, "Gulf Stream") and Ridgeland Recreational Vehicles, Inc. d/b/a Boat N RV Megastore (hereinafter, "BNRV") in the Jasper County Court of Common Pleas. The Thomases' initial Complaint alleged causes of action against the defendants for breach of express and implied warranties. (R. pp. 37-38). Gulf Stream timely filed an Answer including a general denial and affirmative defenses. (R. pp. 39-49). In lieu of an answer, Defendant BNRV filed a Motion to Compel Arbitration. (Motion to Compel Arbitration (Omitted

from ROA)). The Thomases also filed a cross-motion to declare the arbitration agreement/provision invalid. (Plaintiff's Motion to Declare Arbitration Agreement Invalid (Omitted from ROA).

The trial court heard motions concerning arbitration and initially entered an Order Dismissing the Case and Compelling Arbitration. Motions to Alter or Amend followed and the trial court reconsidered her previous ruling, though no written, formal ruling followed. Multiple hearings were held on various motions to reconsider and other procedural matters. On October 28, 2009, the trial court entered an order "vacating" all previous orders issued in the case due to "procedural problems in the past" and the desire to have a more clear appellate record. (R. p. 1).

During this time period the Thomases learned that Gulf Stream contended that some or all of the leaks and water intrusion associated with the RV were caused by BNRV's failure to properly seal the RV during the time it was in BNRV's possession. (R. pp. 59-61). Plaintiffs were granted leave to amend their Complaint to add various causes of action against BNRV. (Id.) The Amended Complaint added causes of action for fraud and misrepresentation, violation of the S.C. Unfair Trade Practices Act, and violation of the S.C. Manufacturers, Distributors, and Dealers Act as against BNRV only.

Ultimately, the parties agree to enter a "Consent Arbitration Agreement and Order" which set forth the terms of the arbitration agreed upon by the parties. (R. pp. 2-6). All parties agreed to have Jon L. Austen, Esquire, serve as the arbitrator.

On December 5 and 6 of 2011, the parties convened before Mr. Austen for the arbitration hearing. The trial of the case lasted two (2) days and by agreement, no party employed a court reporter for the proceedings. No recording of the proceedings exists.

At the close of the evidence, the Thomases moved to amend its complaint against both Defendants pursuant to Rule 15, SCRCP. The Thomases moved to conform to the evidence to include a cause of action against both defendants for revocation of acceptance and rescission.

Contrary to the assertions in Appellant Gulf Stream's brief, neither defendant objected to the motion to amend to conform to the evidence. Appellant Gulf Stream neither objected to the amendment nor presented any arguments to the arbitrator concerning issues of lack of contract, privity, or the like. The arbitrator's Amended Order confirms that this motion to amend was made without objection. (R. pp. 17).

The arbitrator entered an order/award resolving the arbitration on its merits on December 12, 2011. (R. pp. 7-12). Following that Order, the Thomases filed a motion to Modify, Alter, Correct and/or Clarify (R. pp. 84-86). No other party moved for the arbitrator to amend, alter, clarify, or reconsider, though BNRV did brief the issues raised by the Thomases' motion. The arbitrator then entered his amended, final Order. (R. pp. 17-27).

The final Award ordered the defendants to reimburse the Thomases for actual damages, including the value of the RV itself, in the amount of $293,766.22. (R. p. 26). Of this total figure, the arbitrator found BNRV liable for $18,000.00, and Gulf Stream liable for the remaining $275,766.22. (Id.) The arbitrator also ordered Gulf Stream to assume the Thomases' monthly payments on RV, to take title to the RV, and to retrieve the RV at its own expense. (Id.) While the arbitrator found that both Gulf Stream and BNRV shared responsibility for the Thomases' actual damages, the Order found BNRV's responsibility to be lower because the arbitrator reasoned that BNRV could not be held

responsible for damages that were neither foreseeable nor known to it. (Id.) The arbitrator concluded 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 to incur damages up to the date of this order." (R. p. 27).

The arbitrator's Amended Order was entered on February 2, 2012. Rather than move before the arbitrator to reconsider, alter, amend, or clarify this Amended Order/Award, Gulf Stream moved the circuit court for an order amending or vacating the arbitrator's award. (R. pp. 87-89).

On June 13, 2012, Judge Carmen T. Mullen heard oral arguments Gulf Stream's motion to vacate, correct, and/or modify the arbitrator's award. Judge Mullen denied Gulf Stream's motion by an order filed June 29, 2012. (R. pp. 28-33). Gulf Stream then sought reconsideration of that ruling on July 10, 2012. (R. pp. 101-117). That motion was denied by a form order filed on October 12, 2012. (R. p. 34).

On November 2, 2012, Gulf Stream filed its notice of appeal of the circuit court's orders denying its motion to amend or vacate the arbitrator's ruling. (R. p. 118).

STANDARD OF REVIEW

In South Carolina, a party appealing or challenging an arbitrator's ruling and award faces a high burden. The South Carolina Uniform Arbitration Act ("SCUAA") provides the basis for the heightened standard necessary to entitle a party to reversal of an arbitrator's award. Section 15-48-130(a) of the SCUAA 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 the confirm the award." S.C. Code Ann. § 15-48-130(a).

Unlike an appeal from a court of law or equity, an error of law in an arbitrator's award cannot serve as a basis for reversal. *See Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (noting that "[c]ase law presupposes something beyond a mere error in construing or applying the law.").

This steep standard exists primarily because "an arbitration award is conclusive and courts will refuse to review the merits of an award." *Id.* An arbitrator's award can be vacated only under strict circumstances as permitted by the SCUAA. S.C. Code Ann. § 15-48-130(a) instructs that the narrow circumstances allowing for an arbitrator's award to be vacated include instances when the ruling was procured by fraud, the arbitrator has been corrupted, or the arbitrator exceeded his or her power. *Id.*

Absent allegations of corruption, fraud, and the like – none of which are claimed here – an arbitrator's decision may be vacated by a court only when the arbitrator's decision exhibits a "manifest disregard or perverse misconstruction" of the law. *Lauro v. Visnapuu*, 351 S.C. 507, 519, 570 S.E.2d 551, 557 (Ct. App. 2002). This heightened standard is met when an arbitrator is aware of, yet refuses to apply, a governing legal principle. *Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005). Furthermore, that legal principle claimed to be ignored must be "well defined, explicit, and clearly applicable to the case." *Id.* Our 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).

ARGUMENTS

I. No Evidence Exists in the Record to Support a Claim that the Arbitrator Consciously Ignored Controlling Law; Furthermore, Appellant Gulf Stream Failed to Preserve any Such Arguments for the Trial Court or this Appellate Court's Determination.

The trial court's denial of Gulf Stream's motion to vacate the arbitrator's award was correct. However, substantive analysis of the merits of the trial court's decision need not be reached. Appellant Gulf Stream failed to preserve its arguments concerning the sufficiency of the arbitrator's legal determinations. This Court should affirm the circuit court's ruling on the basis of the failure to preserve the issues alone.

When an arbitrator's ruling is challenged on grounds that the arbitrator "manifestly disregarded" the law, the reviewing court's analysis centers upon "the conduct of the arbitrator." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. The party challenging the award 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).

The record before the trial court sitting as the first level of review – just like the record before this Court – is devoid of any evidence or information applicable to the legal standard concerning the arbitrator's conduct. No evidence exists from which the trial court could have concluded that the arbitrator "manifestly disregarded" the law and the trial court was required to rule as it did.

In seeking to vacate the arbitrator's ruling, Gulf Stream argued to the circuit court that "an Arbitrator cannot manifestly disregard the law and the clear relationships of the parties in order to fashion and award in favor of the Plaintiffs. This has been done here and an appeal is necessary and proper." (R. p. 88). These arguments were never

presented to the arbitrator, not even through a motion to reconsider.[1] In fact, by memorandum to the circuit court prior to oral arguments being heard, for the first time Gulf Stream enunciated the particular legal theories that it contends the arbitrator disregarded. (Gulf Stream Memo. in Support of Motion to Vacate (Omitted from ROA). These issues were never raised to the arbitrator, whether by way of pre-arbitration memoranda or correspondence, or after the initial or amended award of the arbitrator. If such issues were raised to the arbitrator, there is no record of such before this court or the trial court below. The lack of any paper record or briefing is compounded by the fact that there is no transcription of the trial, no recording of the evidence or arguments, and no record of these arguments until Gulf Stream's motion to vacate was heard at the Circuit Court level.

Nothing in the record supports Appellant Gulf Stream's allegations against the arbitrator. The issues raised by Gulf Stream, as the appellant, cannot warrant reversal when they were first raised after the arbitrator's final award. *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).

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[1] Though this route also would have been ineffective for issue preservation purposes. *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.")

Here, the arbitrator is the equivalent of the "trial court" in the normal context.[2] Judge Mullen, as the trial judge faced with review of the arbitration award, was first presented with the issues that are now on appeal. This Court has consistently refused to address issues that were not raised to and ruled upon by the trial judge (here, the arbitrator). This is a bedrock consideration of appellate review. For example, recently in *Stephens v. CSXT*, 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012) this Court found that the appellant waived a specific argument when this Court concluded that appellant "did not make this argument to the trial court." (*Id.*) This Court noted:

> When [Appellant] made his motion for partial directed verdict, he never contended that counsel's remarks in opening statement constituted a binding admission that CSX breached its duty. *See Armstrong v. Collins*, 366 S.C. 204, 224-25, 621 S.E.2d 368, 378 (Ct. App. 2005) (finding because appellant did not present to the trial court the argument he raised in his appellate brief, the trial court was never given an opportunity to rule upon that argument, and thus the argument was not preserved for appeal).

Id. Similarly, the *Stephens* Court found lack of preservation and waiver in dealing with an evidentiary issue in that case. According to this Court, in addressing evidentiary issues on appeal a party "may not argue one ground on the admissibility of evidence at trial and an alternate ground on appeal." *Pike v. S.C. Dep't of Transp.*, 332 S.C. 605, 615, 506 S.E.2d 516, 521 (Ct. App. 1998). This Court concluded that because appellant did not present to the trial court the same argument made on appeal, the trial court was deprived of the opportunity to rule as to that argument, and the argument is not preserved for appeal. (*Stephens*).

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[2] As pointed out in Respondent BNRV's Initial Brief, 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).

Based on these same foundational concepts of appellate review, Gulf Stream has failed to preserve for review and waived its arguments concerning the arbitrator's "manifest disregard" of the law. The record shows absolutely no indication that Gulf Stream ever attempted to raise the issues of law it now claims were ignored to the arbitrator. By failing to raise these arguments and legal issues to the arbitrator, the arbitrator had no opportunity to address the alleged errors. Having never raised the issues to the arbitrator, and the arbitrator never having ruled upon these issues, Gulf Stream's arguments are not preserved for review. Gulf Stream's appeal must fail for this fundamental reason.

Even ignoring the issue-preservation problem, Gulf Stream's failure to raise its arguments to the mediator is fatal to the substantive analysis of whether or not the arbitrator knowingly disregarded clear, controlling law. In order to prevail on the issue before the trial court, Gulf Stream must have shown that the arbitrator "knew of a governing legal principle yet refused to apply it." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323–24. Based on the record before the trial court as the "first level of appeal" and the same record before this Court, there is nothing to show that Gulf Stream ever presented the arguments now relied upon to the arbitrator. *See*, *Id.* Gulf Stream cannot show that the arbitrator "knew of a governing principle." Nor can Gulf Stream show that the arbitrator refused to apply a principle that was never raised or argued to him. Because the record does not indicate that the arbitrator knowingly ignored a well-established, clearly-governing legal principle when ruling, the trial court's decision deny vacating the award is proper and the trial court's judgment below must be affirmed.

II. Even if Gulf Stream's Issues Raised for the First Time on Appeal Are Considered, No Grounds Exist for Reversal Because the Arbitrator's Ruling was Correct under Controlling Law and the Evidence Presented.

Even if Appellant had preserved its arguments, on the merits, Gulf Stream's arguments fail. Gulf Stream's contention that no contractual relationship existed between it and the Thomases is central to its arguments on appeal. It follows, Gulf Stream argues, that no contractual remedy exists against it. (Initial Br. of Appellant at 12–18.) This argument is meritless based upon the facts of the case. Second, assuming *arguendo* that this argument should be addressed, affirmation of the circuit court is necessary and appropriate because such finding was harmless.

The arbitrator correctly found that the express warranties issued to the Thomases had failed of their essential purpose. Proper damages, including consequential damages, where appropriately awarded and the verdict could rest upon those findings alone. Therefore, even if the arbitrator's grant of the remedy of rescission of contract were so flawed that it rose to the level of "manifest disregard" of clearly controlling law, the error is harmless because the arbitrator correctly found for the Thomases under the doctrine of the failure of the essential purpose of Defendants' limited warranties. There is no dispute that Gulf Stream issued the Thomases a limited warranty with their RV. The arbitrator, considering the evidence, found that the limited warranty failed of its essential purpose. That factual finding underpins the award and remedies allowed against Gulf Stream and no factual findings have been appealed.

A. Based on the Evidence, the Arbitrator Correctly Ruled that Gulf Stream's Limited Warranty Failed of its Essential Purpose.

Gulf Stream challenges the arbitrator's award on grounds that the arbitrator improperly found that Gulf Stream's "limited warranty failed in its essential purpose so

as to deprive the Plaintiffs of the substantial value of the bargain." (R. p. 25) Gulf Stream argues that 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. (Initial Br. of Appellant at 14.) The arbitrator's order, however, states otherwise.

According to the order, evidence was presented that the Thomases' RV water-intrusion issues "persisted despite repeated repair attempts." (R. pp. 23-25). After attempts made by BNRV to fix the issues, which led to mold and mushroom growth in the RV, the Thomases (as authorized by BNRV) contacted Gulf Stream to make repairs under Gulf Stream's warranty. (R. p. 18). Gulf Stream then directed the Thomases "to go to a North Carolina repair facility run by Bill Plemmons" to fix the leaks. (R. p. 19). The Thomases' RV was out of their possession in North Carolina from late July to October of 2008. (Id.) Even after return of the RV to the Thomases after months of repairs, stemming from June to October, the problems continued. (Id.) After the Thomases took the RV to North Carolina, the Thomases attempted to return the RV to Gulf Stream's facility in Indiana. However, the Thomases' attempt to revoke acceptance of the RV was resisted by Gulf Stream. (R. p. 24). At the time of the hearing, having heard the evidence over two days of trial, the arbitrator concluded that the RV is so defective that "[t]he RV in its current condition is worthless to the Plaintiffs" (R. pp. 17-27).

The evidence presented at trial provided ample evidence to support the arbitrator's conclusion that Gulf Stream'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, Gulf Stream's arguments on appeal are meritless.

B. The Arbitrator Correctly Granted the Remedy of Revocation of Acceptance Once He Found Gulf Stream's Warranty Failed of its Essential Purpose.

Once a limited warranty has failed of its essential purpose, the injured consumer party may "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 Gulf Stream to repossess and take title to the RV and to refund the Thomases their actual and consequential damages associated with the defective RV, with BNRV bearing a portion of the payment responsibility. (R. pp. 26-27).

However, Gulf Stream contends that as the manufacturer of the RV, the Thomases' only remedy against it "should have been the cost to repair or replace" the defective product, rather than revocation of acceptance. (Initial Br. of Appellant at 18.) On this point, Gulf Stream relies upon the 1956 case of *Odom v. Ford Motor Company*, 230 S.C. 320, 95 S.E.2d 601 (1956). Gulf Stream's reliance on this case is misplaced, as the only issue addressed by *Odom* was that an <u>implied</u> 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, in stark contrast to <u>Odom</u>, as part of the Sales Agreement with the Thomases, Gulf Stream offered <u>express</u> limited warranties to them as the

consumer/purchaser. (R. pp. 144-153). Also, Gulf Stream acted upon those express warranties by undertaking long-term, but ultimately unsuccessful attempts to repair the defective RV. Thus, the arbitrator found that Gulf Stream's express limited warranty had failed of its essential purpose. (R. pp. 20-24). 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.

No South Carolina case law suggests that revocation of acceptance cannot run against a manufacturer. Moreover, in the absence of binding authority on the issue, the arbitrator's award and reasoning is supported by persuasive, extra-jurisdictional authority. *Erickson v. Newmar Corp.*, Case Nos. 98-16275 & 98-16276, 2000 U.S. App. LEXIS 18780, at *4–5 (9th Cir. July 26, 2000), provides an example of such persuasive authority. There, the Ninth Circuit affirmed an RV purchaser's revocation of acceptance as to the RV's manufacturer, rather than the seller, stating:

> 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. Similar rationale has been employed by 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) (holding "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.").

Thus, even if Gulf Stream's appellate issues had been presented to the arbitrator, there is no "well defined, explicit, and clearly applicable [law] to the case." *Weimer*, 364 S.C. at 80, 610 S.E.2d at 852. Case law supportive of the arbitrator's ruling, combined with the lack of South Carolina jurisprudence that directly controls the determination, forecloses on Gulf Stream's attempt to reverse the 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.").

C. Even if Basing the Award Upon the Doctrine of the Warranties' Failure of Essential Purpose Amounted to a Manifest Disregard of the Law, Which it Does Not, a Contract Existed between Gulf Stream and the Thomases and the Finding of Revocation of Acceptance Was Appropriate.

Contrary to the arguments raised after the arbitration concerning the lack of a contractual relationship between the Thomases and Gulf Stream, a contractual relationship exists between the parties. Gulf Stream admits as much in its Initial Brief when discussing 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." (Initial Brief at 8.) Furthermore, the sales

contract clearly incorporates Gulf Stream as manufacturer's express warranties as a term of the sale. (R. pp. 151 – 153; pp. 160-162; and, pp. 166-167.)

The arbitrator correctly found that Gulf Stream's express warranty was a material part of the sales contract for the RV. The arbitrator's order found 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). Furthermore, all parties conducted themselves in a manner consistent with Gulf Stream's offer of a warranty through the Sales Agreement provided by BNRV. The evidence showed, and the arbitrator's order reflects, that when BNRV could not repair the water leaks, the parties agreed to allow Gulf Stream to attempt to make repairs through a repairman in North Carolina.

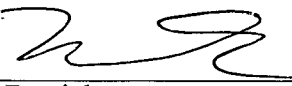
Gulf Stream's argument that no contractual relationship existed between it and the Thomases is demonstrably false. The arbitrator did not "skip... over the obvious problem that there is no contract between Gulfstream and the Thomases." (Initial Br. of Appellant at 15.) Rather, the arbitrator made specific factual and legal findings on this point while Gulf Stream never made an argument to the contrary to the arbitrator. Gulf Stream was even presented with such an opportunity at the point the Thomases moved at the close of all evidence to amend the complaint to allege a cause of action for revocation of acceptance/rescission against both parties. The arbitrator's Amended Order is clear that at that stage, no objections to the amendment were made. Gulf Stream could have contended, through objections, that due to the lack of contract that no such cause of action could exists against it. Gulf Stream did not do so. While this issue need not be

reached, the circuit court was correct in denying Gulf Stream's motion to vacate the arbitrator's award.

CONCLUSION

For the foregoing reasons, Respondents Ralph Thomas and Nancy Thomas respectfully request that this Court affirm the trial court's denial of Appellant's Motion to Vacate the arbitrator's judgment and, to affirm the Order/Award of the arbitrator.

Respectfully submitted,



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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.

RESPONDENTS RALPH THOMAS' AND NANCY THOMAS' CERTIFICATION OF COMPLIANCE WITH RULE 211(B), SCACR

I, the undersigned, as counsel for the Respondents Ralph Thomas and Nancy Thomas, hereby certify that the within Final Brief of the Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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SC Court of Appeals

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