THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

Unpublished Opinion No. 2019-UP-331
Appellate Case No. 2017-000994
Civil Action No. 2014-CP-40-06017

Rajinder Parmar, ... Respondent,

v.

Balbir S. Minhas, Midlands Gastroenterology, PC,
and Midlands Endoscopy Center, LLC,..... Appellants.

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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Attorney for Respondent

Respondent Rajinder Parmer ("Respondent" or "Parmer") submits this Return to Appellant Minhas' ("Minhas") Petition for Rehearing in this matter. After consideration of the briefs filed by the parties and hearing oral arguments, this Court affirmed the circuit court order granting Parmar's motion to confirm an arbitration award. Appellant has now filed a petition for rehearing, challenging this Court's reliance upon sound and well-established principles of law. Appellant appears to take issue with the Court's resolution of this appeal summarily under Rule 220(b), SCACR. The Court properly set forth each issue presented by Appellant and provided the case or cases that support its decision. See, *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53,55,471 S.C.2d 456, 457 (1993). Appellant makes general allegations that this Court misunderstood the purpose and intent of its arguments and largely repeats the arguments previously made in its Final Brief and Reply Brief. Because Appellant has failed to demonstrate that this Court has overlooked or misapprehended any matters of fact or law warranting rehearing of this matter, the petition should be denied.

DISCUSSION

1. **The Court correctly ruled that there was nothing in the Record to suggest that the Parmar was precluded from recovery.**

Appellant contends that the purpose of Argument I was to demonstrate that if the Court determined that the arbitrator's decision was reviewable under the other arguments asserted by Appellant then the arbitrator plainly erred in issuing an award for Parmer. For the reasons set forth below, this Court correctly determined that the merits of the arbitrator's decision was not subject to review. "South Carolina has a strong policy of favoring resolution of disputes through alternative dispute resolution, including arbitration." *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of the award." *Id.* The South Carolina Uniform Arbitration Act enumerates the

exclusive grounds upon which an award may be vacated. This Court correctly considered and applied the Act, the applicable caselaw and the facts in determining that the award should be confirmed.

2. The Court correctly ruled that the circuit court properly compelled the parties to arbitrate the subject disputes.

Appellant fails to introduce any new arguments as to why the circuit court erred in compelling arbitration. Rather, Appellant mischaracterizes the cases relied upon by this Court to support its conclusion that the disputes were, in fact, properly subject to arbitration and rehashes the arguments from its Brief.

Appellant contends that the disputes arise out of the 2014 sales agreements which have no arbitration clauses; and as such, the disputes were not subject to arbitration. The arbitration clauses at issue are contained within the MG Shareholders' Agreement and the MEC Operating Agreement. The MEC arbitration agreement provides as follows:

> "In the event of any controversy or claim ***arising out of or relating to this Agreement, or the breach, termination, or validity thereof***, the parties will attempt in good faith to resolve such controversy or claim.

The MG arbitration agreement contains similar language. These arbitration provisions mean the parties must arbitrate the Disputes if the arbitration agreement remains in force. The parties never agreed to terminate either agreement. Furthermore, nothing in the plain language of the 2014 Agreements indicates an intention to substitute the MG Shareholders' Agreement or the MEC Operating Agreement and the arbitration provisions therein. *See, e.g., Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 778 (10th Cir. 2010) (holding that a subsequent agreement did not supersede a prior agreement where the former did "not explicitly state that [the prior agreement was] nullified"). Parmar contends the arbitration clauses in both the MEC and MG Agreements encompass "any

controversy or claim arising out of or relating to" the Agreements, broadly embracing all disputes between the parties that have a relationship to the contract. The parties' dispute as to the interpretation of the buyout terms of the Agreements clearly arises out of and relates to the Agreements themselves.

The case supporting the analytical framework for determining whether a particular claim is subject to arbitration is *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 553 S.E2d 110 (2001). In *Zabinski*, the court stated:

> To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles, supra.* Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.

This Court cited the specific quotes from *Zabinski* in its Opinion, which Appellant attacks. This Court properly determined at the very least that it cannot be said with "positive assurance" that the Disputes are outside the scope of the arbitration agreement.

3. **The Court correctly ruled that the circuit court did not err in failing to vacate the arbitrators ruling on the grounds that he exceeded his authority under S.C. Code Ann. § 15-48-130(a)(3).**

Appellant complains that this Court failed to address its "novel" issues of South Carolina law regarding an arbitrator's exceeding his powers. Appellants argument fails to recognize that its novel theories of law directly contradict the statutory provisions of the S.C. Arbitration Act and the established caselaw. Notably, Appellants do not argue that the arbitrator exceeded his authority under the common law manifest disregard of the law. Rather, Appellant rehashes the argument that somehow an arbitrator exceeds his authority under § 15-48-130(a)(3) if he manifestly

disregards the terms of the agreement or if the award is not based on a plausible interpretation of the agreement. Appellant argues that in this case the arbitrator exceeded his authority because the parties' contracts plainly prohibit Respondent from receiving any interest in the companies' accounts receivable or bank accounts.

South Carolina courts have consistently held "the question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have attempted to resolve." *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997). Where an arbitrator resolves the very issue presented to him, he has not exceeded his powers, even assuming factual and legal errors. *Id.* at 77; *see also Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998), See also, *Gissell v. Hart,* 382 S.C. at 241, 676 S.E.2d 323 (stating to vacate an arbitrator's award, the "governing law ignored by the arbitrator must be well defined, explicit and clearly applicable.").

This Court quoted *Gissel* in support of its conclusion that an error or fact or law is not sufficient to vacate an award under the Act. Moreover, this Court cited the specific provision of the Act that expressly precludes vacating the award on that basis: "***[T]he fact that the [arbitrator's] relief was such that it could not or would not be granted by a court of law or equity is not [a] ground for vacating or refusing to confirm the award.***" S.C. Code Ann. §15-48-130(a); (Opinon at Ruling 3).

Appellant complains that this Court cited *Helms Realty,* 611 S.E.2d 485, 487-88, for the proposition that the Appellant has the burden of providing a sufficient record for appellate review without explanation as to how the record was insufficient. Appellant's complaint fails to recognize the questions this Court posed to counsel in oral arguments as to how Appellant could ask the Court to consider its argument that the arbitrator exceeded his powers and disregarded the law without providing a complete transcript of the arbitration proceeding in the Record on Appeal.

There are simply no facts in the Record to support a finding that S.C. Code Ann. §15-48-130(a)(3) requires the award be vacated. The arbitrator could not have exceeded his authority by deciding the very issues presented to him. Appellant ignores established South Carolina precedent and the express provisions of the Act and instead urge this court to adopt a novel theory that requires broader statutory authority to vacate arbitration awards. Therefore, this Court addressed, considered and correctly interpreted that that arbitrator did not exceed his authority under the Act.

4. **The Court correctly ruled that the circuit court did not err in failing to reduce the arbitrator's award to avoid a double recovery.**

Parmar argued that this was not an "election of remedies" issue as cited by Appellants. *Iman v. Imperial Chrysler-Plymouth, Inc.*, 397 S.E.2d 774, 776-77. Rather, Appellants characterization of the award as a "double recovery" is merely an objection to the arbitrator's ruling on the merits of the controversy. The Court may correct of modify and award only in accordance with the provisions of S.C. Code Ann. § 15-48-140. There is no common law basis for correcting or modifying an award. Moreover, any modification must have a basis in the Record. Appellant rehashes its request that this Court accept and assume the variance amounts were already included in the accounts receivable and bank accounts awarded to Parmar. There is simply no evidence in the Record as to what monies made up the accounts receivable and the bank accounts, and the Court is not required to take Appellants' word for it. Appellant raised this very issue to the arbitrator in a Motion to Correct, which the arbitrator considered and denied based on the evidence presented at the arbitration hearing. In that Motion, Appellant conceded to the arbitrator that a denial of the Motion to Correct "demonstrates the arbitrator's calculations and ultimate disposition was the product of intentional decision making and free of computational error."

This Court addressed, considered and correctly concluded that this was not an "election of remedies"; that the requested modification was not permitted under the Act; and that there is nothing in the Record to support a conclusion other than the award of the elements of damages were for different losses.

5. **The Court correctly ruled that the circuit court did not err in award post-award, pre-judgment interest pursuant to S.C. Code Ann. § 34-31-20.**

Appellant again simply reasserts its argument previously presented that post-award, prejudgment interest is improper. Appellant ignores *Fitigues, Inc. v. Varat Enterprises, Inc.*, 813 F. Supp. 1336 (N.D. Ill. 1992), a case directly on point which applies South Carolina law, and repeats its plea that the Court adopt the law of North Carolina. Moreover, Appellant seeks to have this Court ignore the prevailing law in other jurisdictions concerning post-award, pre-judgment interest as asserted in established legal treatises addressing this precise issue in arbitrations. *See generally*, Philip L. Bruner & Patrick J. O'Conner, Jr., 8 Bruner & O'Conner on Construction Law § 21:252, *Awarding Interest* (June 2018).

This Court properly applied the analysis set forth in *Fitigues, Inc.* to the facts of this case, which are very similar to those in *Fitigues, Inc.*, in finding that an award of post-award, pre-judgment interest to Parmar was proper.

6. **The Court correctly ruled that the circuit court did not err in confirming the award although it was not timely issued.**

Appellant, yet again, presents nothing more than a regurgitation of the arguments presented in their Brief. This Court correctly found that the Record reflected that Appellant waived any argument when it failed to object to the timeliness of the award until after the award was issued. S.C. Code Ann. § 15-48-90(b). The caselaw cited by Appellant does not mandate strict adherence

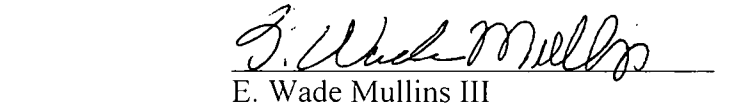
to the AHLA Rules. Nor does it hold that procedural rules of a designated arbitration forum preempt S.C. Code Ann. § 15-48-90(b).

CONCLUSION

For the foregoing reasons, this Court did not overlook or misapprehend either the law or the facts. The Opinion of this Court confirming the circuit court's Order confirming that arbitration award is legally and factually correct. The Petition for Rehearing should be denied.

Respectfully submitted,

BRUNER, POWELL, WALL & MULLINS, LLC



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November 21, 2019
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal, Circuit Court Judge
The Honorable DeAndrea G. Benjamin, Circuit Court Judge
James P. Kelly, Arbitrator

Appellate Case No. 2017-000994
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Rajinder Parmar, ...Respondent,

v.

Balbir S. Minhas, Midlands Gastroenterology, PC, and Midlands Endoscopy Center, LLC, ...
.....Appellants.

CERTIFICATE OF SERVICE

I, Lacey E. Segars, hereby certify that a true and correct copy of the attached **Respondent's Return to Petition for Rehearing** was served upon counsel for the Appellants in the above-captioned matter, by courier hand delivery and depositing a copy of it in the U.S. Mail, postage prepaid, on November 21, 2019, addressed as follows:

Robert L. Widener
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November 21, 2019

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November 21, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Rajinder Parmar vs. Balbir S. Minhas, Midlands Gastroenterology and Midlands Endoscopy Center, LLC
Appellate Case No.: 2017-000994
Unpublished Opinion No.: 2019-UP-331
Our File No.: 7-2797.100

Dear Ms. Kitchings:

Per the Court's Order, enclosed for filing please find an original and seven copies of the ***Respondent's Return to Petition for Rehearing*** regarding the above referenced case and proof of service on counsel for the Appellants. Please file the Return with your office and stamp one copy to return to our courier who will be waiting.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With my kindest regards, I am

Sincerely yours,

Lacey E. Segars

Enclosures

cc: Robert Widener, Esquire (Via Hand Delivery)
Rajinder Parmar (Via Electronic Mail)

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