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
James P. Kelly, Arbitrator

Appellate Case No. 2017-000994
Case No. 2014-CP-40-06017

Rajinder Parmar, ...Respondent,

v.

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

FINAL REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

I. Appellants' Arguments I and II are properly before this Court.

The Respondent (Parmar) argues that Arguments I and II by the Appellants (Minhas) are not preserved for appeal. Those arguments challenge the decision to compel arbitration upon the ground that the 2014 sale of Parmar's stock to Minhas pursuant to the MG Agreement control any claim by Parmar, that Parmar was not thereunder entitled to any additional monies, and that the 2014 sales agreement therefore controlled any claim by Parmar. The 2014 sales agreements have no arbitration clauses.

The brief explicates this argument more fully, but trial counsel repeatedly asserted that there could be no arbitration due to the sale under the MG Agreement and the absence of any arbitration clause in the 2014 sales agreements. (R. 125-127 at ¶¶ 5, 9, 14, 16, 18-20; R. 143-145 at ¶¶ 2, 4, 6-8, and R. 146-147; R. 149-151; R. 626-627 at ¶¶ 9, 11, 19; R. 468, ll. 15-21; 473, ll. 18-19; 474-477, *passim*; and R. 479, ll. 18-23). It is axiomatic that trial counsel was not required to use any "magic words" to preserve the issue and, therefore, the issue is properly before this Court. *Toole v. Toole*, 195 S.E.2d 389, 390-391 (S.C. 1973). Additionally, Parmar admits in his Brief of Respondent that Minhas' position was that the 2014 sales agreements dealt with any ancillary issues, *i.e.*, the issues that the circuit court compelled to arbitration:

> In defending against the declaratory judgment action, Appellants [Minhas] argued there was no binding contractual provision requiring arbitration of any dispute among the parties and the parameters of the [2014 sales agreements] dealt with *not only* the sale of Parmar's interest in the two [business] entities, *but also all ancillary matters contained in the Disputes* [*i.e.*, the issues compelled to arbitration and the issues upon which the arbitrator made his award to Parmar].

(Init. Resp. Br. at 4) (emphasis added). Moreover, Parmar admits that the circuit court "necessarily found the MG and MEC Agreements were ambiguous" when it compelled arbitration, *i.e.*, the trial court understood that the ambiguity issue went to the arbitration issue. (Init. Resp. Br. 12). As to the merits of the issue, including Parmar's erroneous assertion that the MG Agreement was ambiguous, Minhas relies on the Brief of Appellant.[1]

II. The arbitrator exceeded his power under S.C. Code Ann. § 15-48-130(a)(3) and under AHLA Rule 7.5.

Parmar's misperceives Minhas' argument on this point. First, Parmar asserts that Minhas is relying on the common law ground of "manifest disregard of law" for vacating an arbitration award. He is not. Rather, he makes different arguments. First, the arbitrator disregarded the unambiguous terms of the contract, and he thereby exceeded his power under § 15-48-130(a)(3). This is a novel issue that is not controlled by the cases cited by Parmar and, to the extent those cases are relevant, Minhas submits that they should be modified in accordance with his cited authorities. Second, Minhas argues that when the arbitrator disregarded the unambiguous terms of the contract to award Parmar interests in the bank accounts and accounts receivables, he thereby exceeded the power granted to him by AHLA Rule 7.5, which is the controlling rule expressly chosen by the parties in the arbitration agreement. Third, by exceeding the power granted in AHLA Rule 7.5, the arbitrator again violated the power limitation set forth in § 15-48-130(a)(3), even if that code section would permit the arbitrator's award in the absence of AHLA Rule 7.5.

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[1] Throughout his Brief of Respondent, Parmar seems to argue that arbitration was required based upon an email from corporate counsel for the business entities. This argument fails for several reasons. First, the circuit court did not compel arbitration on this basis – it relied on the provisions in the written MEC and MG Agreements. (R. 27-29). Moreover, an attorney cannot create a contract to arbitrate on behalf of his client. Most importantly, and to the extent that the email was some type of arbitration agreement, it is unenforceable because it does not bear the language required by S.C. Code Ann. § 15-48-10(a).

In disputing Minhas' power arguments under AHLA Rule 7.5, Parmar apparently believes that the holding in *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435 (S.C. 2009) is limited to its facts. That case, however, stands for and simply applies the general proposition that the arbitration rules chosen by the parties must be strictly enforced. *Id.* at 438-439. Nothing in the opinion limits itself to the specific facts of the case.

III. The arbitrator's award was untimely.

As set forth in Minhas' Brief of Appellant, the arbitrator's award was untimely under the specific AHLA rules contractually chosen by the parties and, therefore, the circuit court erred in failing to vacate it. In response, Parmar relies on a somewhat contrary provision in S.C. Code Ann. § 15-48-90(b). Parmar's argument would be well taken, if the AHLA rules did not impose a time limit, but the S.C. Code manifestly cannot change the arbitration rules specifically and contractually chosen by the parties. Here again, Parmar attempts to limit *Grant, supra* to its facts but the holding in *Grant* is clear: the arbitration rules contractually chosen by the parties must be strictly enforced.

IV. The judgment must be reduced by $41,000.00 to avoid an impermissible double recovery that is against South Carolina public policy.

Parmar misperceives the facts, the law, and Minhas' argument on the issue of double recovery. First, Parmar argues there is no evidence that the money paid as a variance was included in the bank accounts. This is nonsense. The "variance" award was based on Parmar's claim that the companies owed him additional compensation. The bank accounts and accounts receivable were the only potential source for the companies to pay this additional compensation. Therefore, the variance amount should have been deducted from the bank accounts and accounts receivables amount before also awarding Parmar half of those accounts. In failing to do so, the judgment includes a double recovery of $41,000.

Parmar also argues that this case does not involve an election of remedies situation. The rule, however, is the prevention of double recovery. A double recovery can occur if two remedies yield the same amount of damages for the same conduct and the plaintiff is not required to elect his remedies. The question, however is not how the "double recovery" came to be. Rather, the question is whether the judgment includes a double recovery. If so, the double recovery must be eliminated as a matter of law and public policy.

Parmar also seems to argue that this double recovery issue is not preserved for appeal. As explained in Minhas's Brief of Appellant, the prevention of a double recovery is an exception to South Carolina's error preservation rules. Indeed, the court is required to raise the issue on its own motion at any time in the proceedings in order to prevent a double recovery. See, *e.g.*, *Inman v. Imperial Chrysler-Plymouth, Inc.*, 397 S.E.2d 774, 776-777 (S.C. App. 1990).

For the foregoing reasons, and for the reasons set forth in the Brief of Appellant, the judgment should be reduced by $41,000.00.

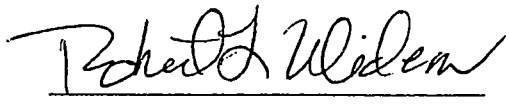
V. The circuit court erred in awarding prejudgment interest.

The arbitrator denied an award of prejudgment interest, but the circuit court nevertheless awarded prejudgment interest from the date of the arbitration award. If the arbitrator's rulings are sacrosanct as argued by Parmar, then his ruling cannot be disturbed. In any event, whether such is permissible is a novel question in South Carolina with no controlling precedent from any South Carolina court. For these reasons, and for the reasons argued in Minhas' Brief of Appellant, the appealed judgment should be reduced by $22,385.94, the amount of interest awarded by the circuit court.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Brief of Appellant, it is respectfully submitted that the arbitration award should be vacated in its entirety or in part as set forth in the foregoing arguments and in the Brief of Appellant.

Respectfully Submitted,



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August 21, 2018
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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