

The State of South Carolina
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

S.C. SUPREME COURT

The Honorable Bentley Price, Circuit Court Judge

Case No. 2019-CP-10-00178
Appellate Case No. 2020-000370

J. DANIEL MAHONEY..... Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III, in his individual capacity,
Defendants/Appellants..... Petitioners.

PETITIONERS' REPLY IN SUPPORT OF MOTION TO STRIKE

EPTING & RANNIK, LLC
Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
jgr@epting-law.com

ATTORNEYS FOR PETITIONERS

Petitioners The Muhler Company, Inc. and Henry M. Hay, III (“Muhler”) submit this reply in support of their Motion to strike certain portions of Respondent’s brief. Respondent repeats an allegation unsupported by *any evidence*¹ in the record—that the arbitrator selection provision is unfair to him—to confuse the issue before this Court.

I. SCOPE OF APPEAL

This Court granted certiorari to address whether an order rewriting an arbitrator selection provision is immediately appealable.² The Appendix contains all material relevant and necessary for this determination. Petitioners could not have inserted additional materials into the Appendix without moving for and receiving leave from this Court; likewise, Respondent’s citations to and discussions of materials not included in the Appendix are improper and must be stricken.

II. ARGUMENT IS NOT EVIDENCE

While conceding that the validity of the arbitration provision itself is not at issue (Opp. to Mot. to Strike at 2), Respondent contends Petitioners omitted relevant evidence from the Appendix and cites that “evidence” in support of the trial court’s ruling. That “evidence” consists of allegations in Respondent’s complaint and the arguments of Respondent’s counsel in a May 31, 2019 hearing *See id.* at 3, 4.

Argument of counsel and allegations in a pleading are not considered evidence. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (“Mr. Bowers, however, relies on the allegations contained in his unverified counterclaim and the arguments made by his

¹ *Infra*, Part II.

² Petitioners recognized that, as a natural consequence of determining the issue of arbitrability, the Court may wish to also address the substantive question of whether an order rewriting an arbitrator selection clause violates the State and Federal statutes requiring that arbitrator selection clauses be enforced as written.

attorney during the hearing on his motion. Mere allegations, denied by the other party, are not evidence.”). “This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.” *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933).

III. CONCLUSION

There is no evidence in the record before this Court or before the trial court to support a finding that the arbitrator selection provision is unfair. For the reasons, Petitioners request this Court strike the referenced portions of Respondent’s brief.³

Respectfully submitted:

This 29th day of December, 2020
Charleston, S.C.

/s/ Jaan G. Rannik
EPTING & RANNIK, LLC
Andrew K. Epting, Jr., Esquire
Jaan G. Rannik, Esquire
46A State Street, Charleston, SC 29401
P: (843) 377-1871
F: (843) 377-1310
ake@epting-law.com
jgr@epting-law.com
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³ Respondent correctly notes that the November 16, 2016 meeting transcript is indeed included in the Appendix. *See* Appendix at 0185. Petitioners withdraw their request to strike references thereto.