

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

Electronically Filed
Apr 18 2022 03:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE MATTER OF THE PETITION
OF CLA PROPERTIES LLC.

SHAWN BIDSAL, AN INDIVIDUAL,
Appellant,

vs.

CLA PROPERTIES LLC, A
CALIFORNIA LIMITED LIABILITY
COMPANY,
Respondent

Case No. 80427

CLA PROPERTIES LLC, A
CALIFORNIA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

SHAWN BIDSAL, AN INDIVIDUAL,
Respondent.

Case No. 80831

PETITION FOR REHEARING IN DOCKET NUMBER 80831

ROBERT L. EISENBERG (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
(775) 786-6868
rle@lge.net

ATTORNEYS FOR APPELLANT CLA PROPERTIES LLC (No. 80831)

PETITION FOR REHEARING IN DOCKET NUMBER 80831

Pursuant to NRAP 40, appellant CLA hereby petitions for rehearing of the panel's Order of Affirmance issued on March 17, 2022. This petition only relates to the affirmance of CLA's appeal in Docket No. 80831, which deals with CLA's claim for post-arbitration attorneys' fees. In this petition, CLA will refer to its appellant's opening brief in the attorneys' fee appeal (No. 80831) as "CLA-AOB," and its appellant's reply brief as "CLA-ARB."

Rehearing is appropriate where the court has overlooked or misapprehended a material fact in the record or a material question of law, or where the court has overlooked, misapplied or failed to consider controlling law. NRAP 40(a) and (c). A party filing a petition for rehearing must identify pages in the party's brief containing issues that the court overlooked or misapprehended. NRAP 40(a)(2).

CLA contends the panel overlooked or misapprehended the record regarding CLA's reliance on federal law relating to review of the arbitration award. CLA also contends the panel overlooked or misapprehended CLA's arguments regarding applicable law, and consequently, the court misapprehended application of the correct law, which is NRS 38.243. These issues were discussed and argued in CLA's briefs at CLA-AOB 74-78 and CLA-ARB at 9-19.

I. Relevant background facts.

This appeal arises out of an arbitration award in a commercial dispute between CLA and Shawn Bidsal. The arbitrator ruled in CLA's favor and included an award of attorneys' fees incurred by CLA during the arbitration proceedings; CLA then filed a district court petition for confirmation of the entire arbitration award. 1 App. 1. Bidsal opposed the petition and filed a counter-petition to vacate the award. 1 App. 76. The district court ruled in CLA's favor and confirmed the award. 11 App. 2610.

Having prevailed in the district court confirmation case, CLA moved for an award of post-arbitration attorneys' fees under NRS 38.243. 11 App. 2621. The district court denied the motion, finding the Nevada statute inapplicable. 13 App. 3050-55. As such, the district court refused to exercise any discretion under the statute. *Id.*

Bidsal appealed from the district court's confirmation of the arbitration award, and CLA appealed from the denial of post-arbitration attorneys' fees. On March 17, 2022, the panel affirmed the district court's rulings in their entirety. In affirming the district court's denial of post-arbitration fees, the panel based its decision on (1) the fact that "CLA cited to and relied solely on federal law [the Federal Arbitration Act (FAA)] when it filed its petition for confirmation of the arbitration award," and (2)

the fact that “the parties agree that the FAA governs judicial review of this arbitration award.” Order of Affirmance at 4.

II. There were two time periods, each governed by a different source of law.

There were two distinct time phases in the analysis of the attorneys’ fee issue. The first phase was the time period covering attorneys’ fees incurred from initiation of the arbitration until the end of the arbitration process when the arbitrator entered his award. The second phase was the time period covering post-arbitration attorneys’ fees incurred from the time of the arbitration award until entry of a district court order confirming or vacating the award. For purposes of attorneys’ fees, these phases were completely different and were governed by two different sources of law.¹

The Operating Agreement, which was the governing contract between the parties, contains a mandatory arbitration clause that includes a sentence requiring the arbitrator to award attorneys’ fees to the party who prevails in the arbitration. 1 App. 35-36. This covers the first phase. The arbitrator in the present case awarded attorneys’ fees for this phase, and the award was not challenged in the appeal. The

¹ There was an additional source of rules that was applicable during the first phase. Under the Agreement, administration of the arbitration itself was governed by JAMS procedural rules. 1 App. 35-36. This would have involved selection of the arbitrator, scheduling, and the like. Application of JAMS procedural rules during the first phase is not relevant to the post-arbitration attorneys’ fee issue in this rehearing petition.

Agreement provided that the arbitrator’s award “shall be final and not subject to judicial review,” other than entry of judgment on the award. 1 App. 36.

Because the Agreement contemplates that the arbitration award will be the end of the dispute-resolution procedures—without judicial review, and with entry of a judgment on the award—there is no express provision in the Operating Agreement for post-arbitration fees incurred in the second phase. Nonetheless, another part of the Agreement, entitled “Choice of Law,” states that the Agreement shall be governed “in all respects” by Nevada law:

d. Choice of Law.

IN ALL RESPECTS THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEVADA INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY, PERFORMANCE AND THE RIGHTS AND INTERESTS OF THE PARTIES UNDER THIS AGREEMENT WITHOUT REGARD TO THE PRINCIPLES GOVERNING CONFLICTS OF LAWS, UNLESS OTHERWISE PROVIDED BY WRITTEN AGREEMENT.

1 App. 44 (capitalization in original; bold added).

The Nevada Choice of Law provision was so important to the parties that it was the **only** paragraph in the entire 28-page Agreement in all capital letters. The provision cannot be ignored, and it must be given legal effect. As this court held in *WPH Architecture, Inc. v. Vegas VP, LP*, 131 Nev. 884, 888, 360 P.3d 1145, 1147 (2015), there is a “well-established tenet of contract interpretation” requiring all

parts of an arbitration contract to be harmonized and given effect, so as not to render any terms meaningless.

This was all carefully explained in CLA's briefs. CLA-AOB 75-78; CLA-ARB 13-17. For example: "Under this interpretation of the Agreement—which is the only reasonable interpretation consistent with Nevada law regarding contract interpretation—the reach of the FAA would end upon confirmation of the award, and the Nevada choice of law provision would govern CLA's motion for an award of attorneys' fees incurred in defending against Bidsal's judicial challenge to the merits of the arbitration award." CLA-ARB 13 (citing *WPH*, 133 Nev. at 888-89, 360 P.3d at 1148).

Surely the Nevada choice of law provision—with its all-capitals emphasis and its requirement for Nevada law being applied to the Agreement "in all respects"—must be given some importance and some impact, somewhere. Yet the district court's ruling leaves absolutely nothing to be governed by the Nevada choice of law provision. 12 App. 3053 (¶ 14) (applying only JAMS rules and the FAA). Further, Bidsal's brief in this appeal fails to identify anything to which the all-capitals Nevada choice of law provision would apply. And similarly, the panel's Order of Affirmance fails to identify anything to which the choice of law provision would apply, if not to the motion for post-arbitration attorneys' fees.

III. The panel's Order of Affirmance overlooks or misapprehends CLA's previous citation to the FAA.

The panel's Order of Affirmance overlooks or misapprehends the Agreement's choice-of-law provision, thereby rendering the provision meaningless and without effect. This justifies rehearing under NRAP 40(c) (rehearing is appropriate where the court has overlooked or misapprehended a material fact in the record or a material question of law).

Post-arbitration attorneys' fees are governed by NRS 38.243. This statute authorizes a district court to award attorneys' fees to the prevailing party in a judicial confirmation proceeding. Specifically, attorneys' fees may be awarded in "litigation incurred in a judicial proceeding **after the [arbitration] award is made.**" NRS 38.243(3) (emphasis added). Nothing in the FAA or the Operating Agreement precludes application of this Nevada statute. Indeed, the Agreement's choice-of-law provision **mandates** application of Nevada law "IN ALL RESPECTS." 1 App. 44 (capitalization in original).

The panel affirmed the district court's refusal to apply NRS 38.243 because (1) "CLA cited to and relied solely on federal law when it filed its petition for confirmation of the arbitration award," and because (2) "the parties agree that the FAA governs judicial review of this arbitration award." Order of Affirmance at 4.

A. CLA’s reliance on the FAA in the petition for confirmation does not preclude application of NRS 38.243.

The panel’s first ground for affirmance is the fact that “CLA cited to and relied solely on federal law when it filed its petition for confirmation of the arbitration award.” Order of Affirmance at 4. Although it is true that CLA relied on the FAA in the petition for **confirmation** of the award, this does not mean the FAA governs post-arbitration attorneys’ fees, or that CLA is precluded from asserting NRS 38.243 as authority for a post-arbitration award of attorneys’ fees.

Requesting confirmation of an arbitration award is completely different from requesting post-arbitration attorneys’ fees. The FAA provides guidance for a district court’s review of the merits of the arbitration award—establishing standards for judicial review of the arbitrator’s findings of fact, determinations of law, and interpretations of the underlying contract—providing grounds for vacating or confirming the award. But the FAA’s scope and application ends at the point where the district court either vacates or confirms the arbitration award. At that point NRS 38.243 becomes applicable, giving the district court authority to award post-arbitration attorneys’ fees incurred in the judicial proceedings that took place after the arbitration award was rendered.

As noted above, CLA filed a petition for confirmation of the arbitration award, and Bidsal filed a counter-petition to vacate the award. 1 App. 1 (petition to

confirm); 1 App. 76 (counter-petition to vacate). CLA's petition cited and relied on the FAA, but **only** as a governing source of law for "the Arbitration" and for providing grounds available for vacating, modifying, or correcting the award. 1 App. 3 (lines 19-27). CLA did not cite or rely on the FAA for any other purpose.

In the judicial proceedings after the parties filed their petitions, CLA did not contend that the FAA governs a district court's power to award post-arbitration fees after the confirmation proceedings. E.g., 11 App. 2626 (motion for post-arbitration attorneys' fees; relying on NRS 38.243, not the FAA). In other words, when CLA cited to the FAA in its petition for confirmation of the arbitration award, and in its subsequent legal briefs in support of the petition to confirm, this had nothing to do with post-arbitration fees. Reliance on the FAA at that time dealt with substantive judicial review standards. E.g., 1 App. 1-4; 11 App. 1289 (arguing that "it is the FAA and not Nevada law that should govern the pending petitions [for judicial review]"). Indeed, any discussion of legal authority for post-arbitration attorneys' fees would have been entirely premature, because there was not yet a prevailing party in the judicial review proceedings.

Once the district court decided to confirm the arbitration award—thereby making CLA the prevailing party in the judicial proceeding after the arbitration—NRS 38.243 became applicable. And at that point CLA correctly asserted the Nevada statute as the legal basis for an award of post-arbitration attorneys' fees.

CLA had previously cited and relied on the FAA only as a source of law governing standards of **judicial review of the arbitration award**. Nothing in the record would support the panel's implied finding that CLA's previous reliance on the FAA, in the context of CLA's petition for confirmation of the award, was somehow a suggestion or concession by CLA that the FAA would also govern the question of post-arbitration attorneys' fees. Nor does the record support the panel's implied suggestion that CLA's citation to the FAA at the onset of the second phase of the proceedings (the judicial review phase) somehow constituted a waiver or estoppel that would prevent CLA from asserting an applicable Nevada statute in a post-confirmation motion for attorneys' fees under NRS 38.243.

Accordingly, the panel misapprehended the record and CLA's arguments regarding reliance and application of the FAA to the issue of post-arbitration attorneys' fees under NRS 38.243. Rehearing should be granted on this basis.

B. CLA's agreement that the FAA "governs judicial review of this arbitration award" does not preclude application of NRS 38.243.

The panel's misapprehension of the record and CLA's arguments is also reflected in the second ground for affirmance, where the panel observes that "the parties agree that the FAA governs judicial review of this arbitration award." Order of Affirmance at 4. The panel's observation is correct that CLA agreed to application of the FAA to govern "**judicial review of the arbitration award.**"

Order of Affirmance at 4 (emphasis added). As explained above, however, review of the arbitration award under the FAA is completely different from the issue of statutory post-arbitration attorneys' fees under NRS 38.243.

CLA never agreed that the FAA governs a district court's power to award post-arbitration fees after the confirmation proceedings. E.g., 11 App. 2626 (motion for post-arbitration attorneys' fees; relying on NRS 38.243, not the FAA). CLA did agree that the FAA "governs judicial review of this arbitration award," as the panel observed. Order of Affirmance at 4. But the motion for post-arbitration attorneys' fees was clearly not seeking "judicial review of this arbitration award." Judicial review of the arbitration award had already occurred and was finished; and the district court had already decided to confirm the award.

Therefore, although the panel was correct in observing that CLA agreed that the FAA governed "judicial review of this arbitration award," the panel misapprehended the consequence of this observation. Judicial review of the arbitration award involved the district court's determination of whether the arbitrator's award satisfied legal standards for such an award. The arbitrator's award did not include any determinations regarding **post**-arbitration fees, because such fees are not incurred until after the arbitration process is finished and after the arbitrator has issued the final award. Determinations regarding post-arbitration fees would have been wholly premature during the arbitration proceedings.

Accordingly, CLA's agreement that the FAA would govern judicial review of the arbitration award in no way constituted an agreement that the FAA would also govern proceedings after conclusion of the judicial review process. And as noted above, CLA's motion for attorneys' fees under NRS 38.243 simply did not involve judicial review of the arbitration award. Rehearing should be granted, based upon the panel's misapprehension of this issue.

IV. Conclusion

The panel overlooked or misapprehended CLA's citation and reliance on the FAA during the judicial review phase of this case. During that phase the FAA was applicable as a source for legal standards relating to the district court's review of the arbitrator's findings and conclusions. CLA correctly cited the FAA at the onset of that phase. But at the conclusion of that phase, when CLA became the prevailing party in the judicial review proceedings, the FAA was no longer applicable. NRS 38.243 became applicable, and CLA correctly relied on it. This statute constituted one of the "laws of the State of Nevada" that are required to be applied under the mandatory choice-of-law provision in the Operating Agreement. The panel misapprehended CLA's earlier citation to the FAA, and the panel attributed inapplicable impact to CLA's earlier citation.

The district court had discretion to award post-arbitration fees under NRS 38.243. The district court erred by determining that there was no such

discretion. Accordingly, rehearing should be granted, and this case should be remanded to the district court for a determination of NRS 38.243 post-arbitration fees.

Date: April 18, 2022

/s/ Robert L. Eisenberg
Robert L. Eisenberg (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
775-786-6868
rle@lge.net

Attorneys for Appellant
CLA Properties LLC in No. 80831

CERTIFICATE OF COMPLIANCE FOR
PETITION FOR REHEARING

I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6) and the size limitation in NRAP 40(b)(3), because this petition has been prepared in a proportionally spaced typeface using MS Word in 14 point Times New Roman type style, and the petition contains 2,576 words.

DATED: April 18, 2022

/s/ Robert L. Eisenberg
Robert L. Eisenberg (SBN 950)
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, NV 89519
775-786-6868
rle@lge.net

Attorneys for Appellant
CLA Properties LLC in No. 80831

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEMONS, GRUNDY & EISENBERG, and on this date the foregoing document was electronically filed with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Smith & Shapiro, PLLC
Reisman Sorokac
Lewis Roca Rothgerber Christie, LLC

DATED: April 18, 2022

/s/ Margie Nevin
Margie Nevin
Employee of Lemons, Grundy & Eisenberg