

**Affirmed and Memorandum Opinion filed September 15, 2022.**



**In The**

**Fourteenth Court of Appeals**

---

**NO. 14-20-00853-CV**

---

**5177 BUILDERS, LTD. D/B/A LOVETT HOMES, Appellant**

**V.**

**K&G ESTATES, LLC, Appellee**

---

**On Appeal from the 270th District Court  
Harris County, Texas  
Trial Court Cause No. 2020-71690**

---

**MEMORANDUM OPINION**

In one issue appellant 5177 Builders, Ltd. D/B/A Lovett Homes appeals the trial court's confirmation of the arbitration award against it. Appellant argues that the trial court should have modified the arbitrator's award of attorney's fees to appellee K&G Estates, LLC because the arbitrator exceeded his authority in awarding them. We affirm.

## CONFIRMATION OF THE ARBITRATOR'S AWARD OF ATTORNEY'S FEES

Appellant contends that the trial court erred by enforcing the arbitrator's award of attorney's fees because the arbitrator exceeded his authority under the parties' agreement.

### A. General Legal Principles

We review de novo a trial court's decision to confirm or vacate an arbitration award. *D.R. Horton-Tex., Ltd. v. Bernhard*, 423 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). “An arbitration award has the same effect as a judgment of a court of last resort; accordingly, all reasonable presumptions are indulged in favor of the award and the award is conclusive on the parties as to all matters of fact and law.” *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 683 (Tex. App.—Dallas 2010, pet. denied).

Absent an agreement expanding its scope, judicial review “is so limited that even a mistake of fact or law by the arbitrator in the application of substantive law is not a proper ground for vacating an award.” *Id.* We do not pass judgment on whether an arbitrator correctly awarded attorney's fees under the law, but instead whether the issue of attorney's fees was properly before him. *See Bernhard*, 423 S.W.3d at 534 (“We pass no judgment on whether the arbitrator made a correct decision under the law and facts of this case.”); *Centex/Vestal*, 314 S.W.3d at 684. In determining whether the arbitrator has exceeded his power, any doubt concerning the scope of what is arbitrable is resolved in favor of arbitration. *Centex/Vestal*, 314 S.W.3d at 684. When there is a broad arbitration clause, arbitration of a particular claim should not be denied unless it can be said “with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Kline v. O'Quinn*, 874 S.W.2d 776, 782 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

When a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award. *Centex/Vestal*, 314 S.W.3d at 684. Without an arbitration transcript, we must presume the arbitration evidence adequately supported an award. *Id.*

## **B. Background**

Appellee signed an agreement with appellant for the purchase of a new home. After the purchase, issues arose with the home and appellee filed an arbitration proceeding against appellant for breaches of implied warranties, fraud, breach of contract and limited warranty, negligence, and negligent misrepresentation, among other claims. Appellee sought damages and attorney's fees.

In their agreement, the parties agreed to submit "any and all disputes relating to or arising out of this Warranty, the construction of the Home, the condition of the Home, or *any other matter* between the parties through binding arbitration."

In the contract, the parties agreed that:

The arbitrator shall not award attorneys' fees and none shall be recovered by any party in any arbitration or other proceeding arising out of or relating to this Warranty or the Home. Any and all disputes relating to the Home or this Warranty or between the Builder and the Homeowner are subject to the alternate dispute resolution process and this section.

After a hearing, the arbitrator awarded damages and attorney's fees to appellee. In the arbitrator's award, the arbitrator indicated that:

The Construction Documents, specifically the Limited Warranty, excludes this Arbitrator from awarding any party attorney fees for a cause of action excluded under the agreement. As previously stated, the Implied Warranty of Habitability and Fraud in the Real Estate

Transaction, are not excluded by the limited warranty. The cause of action sounding in Fraud in the Real Estate Transaction allows for the award of attorney's fees and other costs. After reviewing and considering the post hearing briefs and arguments regarding attorney's fees, I find that the attorney's fees incurred by K&G Estates are reasonable and necessary and award Claimant . . . attorney fees in the amount of \$246,850.35.

Appellant sought to modify, correct, or vacate the arbitration award in the trial court and appellee moved to confirm. The trial court confirmed the arbitration award.

### **C. Analysis**

Here, appellant argues that the arbitrator "exceeded his jurisdiction under the contract" because the agreement's arbitration clause barred any award of attorney's fees. Appellant admits that in the award, "the arbitrator makes a finding that the limited warranty of habitability and fraud in real estate transaction claims are not excluded by the Limited Warranty and therefore attorney's fees may be awarded. However, the arbitrator omitted any analysis of whether the claims relate to the 'Home.'" Appellant then asks this Court to interpret the contract and the term "Home" and arrive at the conclusion that based on the claims made by appellee and the interpretation of the provision, the arbitrator exceeded his authority by awarding attorney's fees. Appellant argues that "[t]he arbitration clause in the Limited Warranty applies to both claims related to the Warranty, as well as claims related to the Home. . . . Because the claims clearly relate to the Home, attorney's fees cannot be awarded pursuant to the plain and unambiguous terms of the agreement."

Appellant tacitly concedes that the arbitrator was within his authority to conclude that the cause of action upon which appellee recovered damages was outside of the scope of the Limited Warranty and, therefore, appellee could be

awarded statutory attorney's fees. Appellant does not argue that the attorney's fee provision prohibits an award on this basis as outside of the arbitrator's authority. Appellant's issue then is that the arbitrator did not expressly analyze whether the claims relate to the "Home" and indicates that this Court's "task is to determine whether the arbitrator was authorized by the Limited Warranty to award attorney's fees."

The arbitration provision in the agreement is broad, indicating that "any and all disputes relating to or arising out of this Warranty, the construction of the Home, the condition of the Home, or *any other matter* between the parties" is to be submitted to binding arbitration. This term is broad, encompassing a wide range of disputes and is construed as "evidencing the parties' intent to be inclusive rather than exclusive." *Centex/Vestal*, 314 S.W.3d at 685. With respect to the arbitration provisions in the agreement before us, none of the provisions curtail the arbitrator's general authority to decide disputes arising from the agreement. *See Preston v. Dyer*, No. 09-11-00200-CV, 2012 WL 5960193, at \*4 (Tex. App.—Beaumont Nov. 29, 2012, pet. denied) (mem. op.) (agreement provided husband had "sole discretion" in determining spousal support; court concluded that arbitrator did not exceed authority in awarding spousal support "[b]ecause . . . agreement authorized the arbitrator to interpret the . . . agreement and to render an award of spousal support, we conclude that the dispute over spousal support is an issue the parties intended and agreed to arbitrate"). In other words, the parties disputed whether the limited warranty provision was applicable to appellee's claim for attorney's fees and the arbitrator, given his broad discretion to decide disputes arising from the agreement, determined that appellee's claim was outside of the warranty provision's limitation on attorney's fees in issuing the award.

Appellant indicates that our task is to “determine whether the arbitrator was authorized by the Limited Warranty to award attorney’s fees.” We conclude that it does authorize an award of attorney’s fees, though because of our limited review of an arbitrator’s award, we do not analyze whether the arbitrator’s award did so correctly.<sup>1</sup> See *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (“Judicial review of [an arbitration] decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator’s decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties’ agreement.”); *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (“[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”); see also *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1219 n.3 (5th Cir. 1990) (“[The court] does not review the language used by, or the reasoning of, the arbitrators in determining whether their award draws its *essence* from the contract., [The court] looks only to the result reached. The single question is whether the award, however arrived at, is rationally inferable from the contract.”); *Bernhard*, 423 S.W.3d at 535 (“We pass no judgment on whether the arbitrator made a correct decision under the law and facts of this case. But the issue of attorney’s fees was clearly submitted to the arbitrator, and the arbitrator consulted the contractual provisions and statutes regarding attorney’s fees when reaching his conclusion.”); see also *Taylor Morrison of Tex., Inc. v. Fulcher*, No. 13-20-00332-CV, 2022 WL 3092553 (Tex. App.—Corpus Christi—Edinburg Aug. 4, 2022, no pet. h.) (mem. op.) (same).

---

<sup>1</sup> The parties agree that there is no apparent or substantive difference between the analysis employed under the Federal Arbitration Act and the Texas Arbitration Act as applied to this case.

The attorney’s fee provision clearly does not restrict *any and all* authority of the arbitrator to award attorney’s fees, but instead limits only those fees being sought under certain, specified circumstances. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011) (concluding the following language was a general prohibition or limitation on the arbitrator’s authority: “an arbitrator . . . ‘does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.’”). Here, appellant merely disputes whether appellee’s claims fall within the contract’s attorney’s fee provision. *See Centex/Vestal*, 314 S.W.3d at 686 (“In our evaluation of the . . . argument, we are mindful of other courts’ caution against a party’s use of the authority argument as a ruse to induce the reviewing court to redetermine the facts—even just a tiny bit—or reach a legal conclusion on them as found or hoped for which differs from that of the arbitrators.” (internal quotations omitted)).

The cases cited by appellant offer no support for its argument. *See Townes Telecomms., Inc. v. Travis, Wolff & Co., L.L.P.*, 291 S.W.3d 490, 492–94 (Tex. App.—Dallas 2009, pet. denied); *Lee v. Daniels & Daniels*, 264 S.W.3d 273, 282 (Tex. App.—San Antonio 2008, pet. denied); *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631, 639 (Tex. App.—Waco 2003, no pet.). In *Townes*, the arbitration agreement stated that “[a]ll reasonable costs of both parties . . . shall be borne entirely by the non-prevailing party (to be designated by the arbitration panel in the award) and may not be allocated between the parties by the arbitration panel.” *Townes*, 291 S.W.3d at 492–93. Citing to fault by both parties, the arbitrator refused to designate either as the non-prevailing party. *Id.* at 493. The award provided that each party should pay their own attorney’s fees and expert witness costs and equally share the cost of the arbitration. *Id.* On appeal, the court

concluded that splitting the costs was clearly not permitted under the agreement and was, therefore, outside of the arbitrator’s authority. *Id.* at 494. In *Townes*, there was no instance in which the costs could be allocated between the parties under the agreement and neither party made any argument to the arbitrator that there was an interpretation of the agreement that would allow the arbitrator to permissibly split the costs or decline to designate a “non-prevailing” party. Therefore, *Townes* is distinguishable.<sup>2</sup> Here, appellee argued an exception to the attorney’s fee provision and the arbitrator agreed, awarding appellee attorney’s fees and costs.

There is no argument that the arbitrator did not have the authority to interpret the terms of the agreement. Neither party argues that the agreement provided for an expanded judicial review. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 91 (Tex. 2011) (provision specifically provided that the arbitrator did not have authority to take certain actions); *Universal Comp. Sys. v. Dealer Sols., L.L.C.*, 183 S.W.3d 741, 752 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (“It is not our province to determine the proper construction of the parties’ license agreement.”).

---

<sup>2</sup> The other two cases cited by appellant are also distinguishable in the same manner as *Townes*. *See Lee v. Daniels & Daniels*, 264 S.W.3d 273, 282 (Tex. App.—San Antonio 2008, pet. denied) (concluding arbitrator exceeded authority by assessing all of arbitrator’s costs against one party when the agreement indicated the parties would each pay fifty percent of the cost of the arbitrator); *Peacock v. Wave Tec Pools, Inc.*, 107 S.W.3d 631, 639 (Tex. App.—Waco 2003, no pet.). In *Lee*, the language in the agreement was not contingent upon particular claims being asserted, but the agreement in this case is contingent. *See Lee*, 264 S.W.3d at 282. Further, there is no indication that the parties in *Lee* argued that there was an interpretation of the agreement that would allow the arbitrator to make such an award. *See id.* In *Peacock*, the court held that “because the arbitrator’s authority is limited . . ., and because Wave Tec did not contend the decision sought was incomplete . . . the arbitrator’s award” exceeded the scope of the arbitration agreement. *Peacock*, 107 S.W.3d at 639. Because Wave Tec did not argue another interpretation that would have allowed for the award and the agreement did not allow for the award, the court concluded the award was outside of the arbitration agreement’s scope. *See id.*



Appellee argues that in this case the arbitrator concluded that appellant committed fraud and that the arbitrator correctly determined that the agreement limiting liability, both the limited warranty provisions and the attorney's fee provision within the limited warranty, were "vitiating" as a result of appellant's fraud. *See NetKnowledge Techs. LLC v. Rapid Transit Techs. (WaKuL Inc.)*, 269 Fed. App'x. 443, 444 (5th Cir. 2008) ("The Arbitrator did not exceed his authority by awarding damages to WaKuL in excess of the Master Purchase Agreement . . . limitation of liability provision because [the arbitrator] determined that the limitation . . . was void due to fraudulent inducement."). Appellee has such a claim in its Third Amended Statement of Claims filed with the arbitrator, requesting fees because the "limitations of liability . . . in the . . . Express Limited Warranty . . . are voidable, . . . because of [appellant's] fraudulent actions and its fraudulent inducement of the contractual relationship between the parties." Because the record on appeal does not contain the transcript of the arbitration hearings, we must presume the arbitration evidence adequately supported the award. *Centex/Vestal*, 314 S.W.3d at 684 ("[W]hen a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award.").

Because the attorney fee provision only limits the circumstances under which a party may obtain an award of attorney's fees, the parties agreed to submit all disputes to the arbitrator, there is no provision expanding judicial review of this agreement, and there is a basis on which the arbitrator could have made an award of attorney's fees, we conclude it was within the arbitrator's authority to decide whether appellee's claims were outside of the agreement's provision limiting attorney's fees. *See Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th

Cir. 1994) (“[I]t is not surprising that we have frequently upheld arbitration awards against challenges on [the ground of lack of authority].”).

We overrule appellant’s sole issue and affirm the judgment of the trial court confirming the arbitration award.

/s/ Ken Wise  
Justice

Panel consists of Justices Wise, Poissant, and Wilson.