COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2328 **Cir. Ct. No. 2011CV1526**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MINERALS DEVELOPMENT & SUPPLY COMPANY, INC., KENIN L. EDWARDS AND JAMES R. COTE, JR.,

PLAINTIFFS-APPELLANTS,

V.

SUPERIOR SILICA SANDS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 LUNDSTEN, J. This case is an appeal from the circuit court's confirmation of an arbitration award in favor of Superior Silica Sands, LLC, and

against Minerals Development & Supply Company, Inc.[1] The three-arbitrator panel had rejected Minerals' claim that Superior fraudulently induced Minerals into a settlement agreement, and ordered Minerals to comply with the settlement agreement.

¶2 Minerals raises 15 issues.[2] Those issues involve a wide range of topics, from the circuit court's competency to confirm the award to the propriety of various arbitration and other expenses awarded to Superior. We do not attempt to summarize all of the issues here, saving more detail for discussion below. We resolve each issue against Minerals, and therefore affirm.

Background

¶3 Minerals and Superior entered into a supply contract (the "contract") under which Minerals would provide Superior with sand that was mined and processed in Wisconsin. The contract provided that Superior would make a $4 million prepayment to Minerals and that Minerals would refund the balance of that prepayment if the contract was terminated before all of the prepayment had been used up. Minerals' officers Kenin Edwards and James Cote, Jr., executed a personal guaranty relating to the contract.

¶4 The contract included arbitration provisions. In particular, the parties agreed to arbitrate "any controversy, claim, question, disagreement or

[1] Additional appellants and parties to the award are Kenin Edwards and James Cote, Jr., who were Minerals' sole officers, directors, and shareholders. For ease of reference, we refer only to "Minerals," except when necessary to refer to Edwards or Cote individually.

[2] Minerals purports to raise 16 issues, but we treat Minerals' issues 11 and 12 as a single issue.

dispute ... arising out of or relating to this Agreement, or the relationship between the parties."

¶5 Superior terminated the contract effective August 1, 2009. Minerals filed a demand for arbitration, alleging breach of contract and other claims. The arbitration panel consisted of two retired Wisconsin state judges, Gordon Myse and Gerald Nichol, and a retired New York federal judge, John Martin.

¶6 An arbitration hearing was scheduled but then cancelled when Minerals notified the arbitrators in June 2010 that the parties had settled. Sometime within the next month, however, a dispute arose as to whether Superior fraudulently induced Minerals into the settlement by making misrepresentations about Superior's financial condition.

¶7 The parties agreed to arbitrate the issue of whether the June 2010 settlement agreement was enforceable. The arbitrators concluded that the agreement was not enforceable, not because of fraud, but because the agreement had never been reduced to writing. A hearing was rescheduled for the week of October 4, 2010. The parties agreed to hold the hearing in Madison. Two days into the hearing, the parties reached a new settlement agreement, the terms of which were read into the arbitration hearing record and were agreed to by all parties on the record.

¶8 The October 2010 settlement agreement obligated Superior to pay Minerals $500,000. It also obligated Minerals, upon receipt of the settlement proceeds, to dismiss related federal court claims against certain other non-Superior defendants.

¶9 Minerals received the $500,000 in settlement proceeds but refused to dismiss its federal claims as agreed. Minerals instead *added* federal claims against Superior, alleging that Superior fraudulently induced Minerals into the October 2010 settlement agreement by making misrepresentations about Superior's financial condition.

¶10 Superior moved the arbitrators to decide whether the October 2010 settlement agreement was enforceable. Minerals objected, arguing that the arbitrators lacked jurisdiction because the only dispute between the parties was a "post-arbitration" dispute. The arbitrators disagreed. They reasoned, in part, that, if the October 2010 settlement agreement was not enforceable, then the arbitration that Minerals had initiated would need to continue in order to resolve the parties' ongoing disputes.

¶11 The arbitrators requested and received an agreement from the parties to hold a hearing in Florida. The reasons for this were that the arbitrators would be in Florida for the winter, and one of the arbitrators would be recuperating from a planned surgery. The hearing was scheduled for December 4, 2010. Although Minerals did not object to the Florida location, Minerals did not withdraw its objections to the arbitrators' jurisdiction.

¶12 The day before the December 4, 2010 hearing, a federal court rejected Minerals' attempt to enjoin the arbitration, concluding that the arbitrators had jurisdiction. Minerals nonetheless declined to appear at the December 4 hearing. The arbitrators took evidence. After receiving additional submissions, the arbitrators concluded that the October 2010 settlement agreement was valid and binding, and issued an award in favor of Superior.

¶13 The arbitrators' award included detailed findings and conclusions. Among the arbitrators' conclusions were:

(1) Minerals could not do all of the following: retain the $500,000 in settlement proceeds, fail to perform its obligations under the October 2010 settlement agreement, and pursue a fraud claim. The arbitrators recognized case law allowing a party either to rescind a contract or to affirm a contract and pursue fraud damages, but the arbitrators concluded that Minerals had failed to affirm the October 2010 settlement agreement by failing to perform its obligations under the agreement.

(2) Even if Minerals could pursue its fraud claim, the claim lacked merit because Minerals could not prove each of the required elements.

(3) The October 2010 settlement agreement was therefore not induced by fraud and was enforceable.

¶14 As to their second conclusion regarding the merits of Minerals' fraud claim, the arbitrators expressly found that "no one associated with Superior made any false statements to [Minerals]." The arbitrators further found and concluded that, even if someone had made a false statement, Minerals could not show justifiable reliance:

> Given the fact that [Minerals] justified its refusal to proceed with the [first,] June [2010] settlement by claiming that it was fraudulently induced … and thereafter filed interrogatory responses identifying specific allegedly false statements …, [Minerals'] assertion that it relied on similar representations in [the] October [2010 settlement agreement] is patently absurd. No rational trier of fact could find that [Minerals] justifiably relied on the same type of statements which allegedly induced it to enter into the June settlement agreement…. For sophisticated businessmen and their counsel to make such a claim speaks only to their credibility.

¶15 The arbitrators ordered Minerals to comply with the settlement agreement, and awarded Superior approximately $284,000 in attorney's fees and other expenses as the prevailing party pursuant to provisions in the parties' contract. In addition, the arbitrators ordered Minerals to pay certain arbitration expenses. Finally, the arbitrators imposed a $10,000 sanction on Minerals, concluding that Minerals' arguments were mostly frivolous.

¶16 Minerals filed a complaint in the circuit court seeking to vacate the award. Superior sought confirmation of the award.

¶17 After extensive litigation in the circuit court, the court issued a written decision confirming the award and making detailed findings of fact and conclusions of law. The court also denied Minerals' motion for reconsideration in a second written decision containing additional findings and conclusions. The court awarded Superior about $349,000 in additional attorney's fees for the court litigation, along with about $53,000 in post-award/prejudgment interest, for an additional sum of more than $402,000. The court commented that Minerals over-litigated the matter to a point that "frustrated the intended summary nature of these confirmation proceedings as well as this state's longstanding and strong policy favoring arbitration and settlements."

¶18 We reference additional facts as needed in the discussion below.

Discussion

¶19 We start with preliminary matters. After those are out of the way, we turn to Minerals' 15 issues.

¶20 First, the parties agreed in their contract that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, would apply and preempt any inconsistent state law. At the

same time, however, the contract includes a choice-of-law provision specifying that Wisconsin law applies. In their briefing, the parties reference federal, Wisconsin, and other state law. With respect to each issue, we follow the parties' lead and address the law that the parties cite, except where there is an express dispute regarding the applicable law.

¶21 Second, the parties agreed in the contract to follow the Commercial Arbitration Rules of the American Arbitration Association in any arbitrable dispute. Thus, when we refer below to an "arbitration rule," we mean one of those rules.

¶22 Third, although Minerals takes care to frame its issues in terms of our standards of review for an arbitration award, the substance of Minerals' arguments often fails to recognize that such review is strictly limited. The award is "presumptively valid and the court exercises only a supervisory role in reviewing an arbitration award." ***Fortney v. School Dist. of West Salem***, 108 Wis. 2d 167, 171, 321 N.W.2d 225 (1982); *see also* ***Halim v. Great Gatsby's Auction Gallery, Inc.***, 516 F.3d 557, 563 (7th Cir. 2008) ("Factual or legal error, no matter how gross, is insufficient to support overturning an arbitration award."); ***Eljer Mfg., Inc. v. Kowin Dev. Corp.***, 14 F.3d 1250, 1253 (7th Cir. 1994) ("[The] scope of review of a commercial arbitration award is grudgingly narrow.").

¶23 The more specific standards for review of an arbitration award are in 9 U.S.C. § 10(a), 9 U.S.C. § 11(a), and WIS. STAT. §§ 788.10(1) and 788.11(1) (2011-12).[3] We need not recite all of those standards here. Although we address each issue, this should not be read as an implicit conclusion that we agree with

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Minerals that each issue is a proper one for judicial review. Sometimes it is simply more efficient to address an issue on the merits, or to explain why Minerals forfeited or conceded the issue, than to engage in a discussion of our standard of review.

1. The Circuit Court's Competency To Confirm The Award

¶24 Minerals filed this action in the circuit court in Wisconsin, but, as we understand it, now argues that Wisconsin circuit courts lacked competency over the matter. The fact that Minerals filed this action in the circuit court in Wisconsin suggests that Minerals has forfeited any claim that the court lacked competency, but Minerals appears to assert that it could not waive competency. We say "appears" because, when Minerals goes on to support this apparent argument, it shifts from using the word "competency" to using the word "jurisdiction," meaning subject matter jurisdiction.

¶25 We acknowledge that the distinction in Wisconsin between competency and subject matter jurisdiction has not always been clear. One recent attempt at clarification is the following:

> [C]ompetency refers to [the circuit court's] "ability to exercise the subject matter jurisdiction vested in it" by Article VII, Section 8 of the Wisconsin Constitution. That section of the constitution states that "[e]xcept as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state." Although the circuit court may not be deprived of jurisdiction "[e]xcept as otherwise provided by law," it may lack competency to render a valid order or judgment in a civil or criminal matter when the parties fail to meet certain statutory requirements.

Village of Elm Grove v. Brefka, 2013 WI 54, ¶16, 348 Wis. 2d 282, 832 N.W.2d 121 (citations omitted).

¶26 Regardless of the distinction between competency and subject matter jurisdiction, we will assume, without deciding, that Minerals' competency/jurisdiction argument has not been waived or forfeited. We reject the argument. As explained further below, Minerals' limited supporting arguments fail to persuade us that the circuit court lacked competency or jurisdiction.

¶27 Minerals essentially argues that a circuit court in Wisconsin does not have competency or jurisdiction because the award in this case was made in Florida. Minerals relies on WIS. STAT. § 788.09, which provides a procedure for confirming an arbitration award in the circuit court "for the county within which such award was made." The statute, more fully, reads:

> At any time within one year after the award is made any party to the arbitration may apply *to the court in and for the county within which such award was made* for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected under s. 788.10 or 788.11.

Id. (emphasis added). Similar language is found in WIS. STAT. §§ 788.10 and 788.11, which provide a procedure for vacating or modifying arbitration awards. The latter two statutes refer to "the court in and for the county wherein the award was made." *See* §§ 788.10(1) and 788.11(1).

¶28 As we understand it, Minerals is arguing, based on WIS. STAT. § 788.09, that the Wisconsin circuit court lacked competency or jurisdiction because the arbitration award "was made" in Florida, where the final arbitration hearing occurred, and, thus, was not made in Wisconsin. It follows, Minerals seemingly contends, that no Wisconsin circuit court has competency or jurisdiction over the matter.

¶29 If we were to assume, without deciding, that WIS. STAT. § 788.09 could be read as a competency or jurisdiction statute, there is still a mismatch between the statutory language and Minerals' argument. The statute focuses on which county within Wisconsin is a proper forum for judicial review, not on which state is a proper forum. Thus, the statute does not appear to support Minerals' contention that no Wisconsin circuit court had competency or jurisdiction.

¶30 This mismatch is enough for us to reject Minerals' argument that is based on WIS. STAT. § 788.09. However, we additionally reject Minerals' argument because Minerals fails to persuade us that the award "was made" in Florida.

¶31 Minerals' assertion that the award was made in Florida is based on the fact that the final arbitration hearing was held in Florida. However, the arbitrators did not announce their decision at this hearing, and Minerals does not provide support for its assertion that the location of this final hearing determines where the award was "made."

¶32 Minerals cites a handful of cases from other states, but those cases neither refer to competency nor, as does the Wisconsin statute that Minerals relies on, to counties within a state. Instead, the statutes cited in the cases refer to "jurisdiction" of the courts in a given state to review an arbitration award. *See* ***Valent Biosciences Corp. v. Kim-C1, LLC***, 952 N.E.2d 657, 664 (Ill. App. Ct. 2011) (citing 710 ILCS 5/16 (West 2008)); ***Artrip v. Samons Constr. Inc.***, 54 S.W.3d 169, 171-72 (Ky. Ct. App. 2001) (citing KY. REV. STAT. § 417.200); ***State ex rel. Tri-City Constr. Co. v. Marsh***, 668 S.W.2d 148, 150 (Mo. Ct. App. 1984) (citing section 435.430 of Missouri Uniform Arbitration Act). None of these cases

appear to support the conclusion that the circuit court here lacked competency or jurisdiction.

¶33 In ***Tri-City***, for example, the pertinent Missouri statute provided that Missouri courts have "jurisdiction" to enforce an arbitration award if the parties enter into a contract "providing for arbitration in [Missouri]." *See* ***Tri-City***, 668 S.W.2d at 150. We are unsure why Minerals believes that ***Tri-City*** supports its view. We observe that, if statutory language like Missouri's were applied here, the result would be that Wisconsin courts have "jurisdiction" over the award because Minerals and Superior entered into a contract "providing for" arbitration in Wisconsin.

¶34 In sum, if there is some reasonable basis to construe WIS. STAT. § 788.09 the way Minerals does, Minerals has not identified it. And, Minerals presents no other developed argument as to why it would matter, for purposes of the circuit court's competency or jurisdiction, that the final arbitration hearing was held in Florida instead of in Wisconsin. Accordingly, we conclude that the circuit court had competency to confirm the arbitration award.

2. Superior's Failure To Seek A Court Order To Compel Arbitration On Minerals' Fraud In The Inducement Claim

¶35 Minerals argues that the parties' contract requires that a party seeking arbitration must obtain a court order compelling arbitration. According to Minerals, Superior's request to have the arbitrators address Minerals' fraud in the inducement claim is not covered by the court order for arbitration that Minerals previously obtained because Superior's request was made after the October 2010 settlement agreement and, therefore, after the court-ordered arbitration had already concluded. This Minerals argument is not well developed, but, as we understand

it, the argument rests on the premise that Superior was, in effect, seeking a *new* arbitration when Superior asked the arbitrators to address the enforceability of the October 2010 settlement agreement and, thus, needed a new court order. For the reasons that the arbitrators and the circuit court both discussed at length in their decisions, we reject this premise.

¶36 In short, the arbitrators and the circuit court explained that the fraud claim was part of a broader dispute as to the enforceability of the October 2010 settlement agreement, an agreement reached to put an end to the arbitration proceeding and one that was put on the record and agreed to by all parties in front of the arbitration panel. If the agreement was not enforceable because of fraud, then the arbitration that Minerals initiated would have to resume in order to resolve the parties' disputes. Therefore, Minerals' fraud claim was part of the same, continuing arbitration. Indeed, Minerals essentially took this same position when Minerals asked the arbitrators to decide whether the June 2010 settlement agreement was not enforceable because of alleged fraud. Minerals now takes an inconsistent position, and we reject it.

3. Arbitrators' Application Of The Choice-Of-Law Clause

¶37 The Wisconsin choice-of-law clause in the parties' contract provides that the contract "shall be governed by, subject to, and construed according to the internal laws … of the State of Wisconsin." The arbitrators relied on both Wisconsin and non-Wisconsin case law in addressing whether Minerals could retain the $500,000 in settlement proceedings, fail to perform its obligations under the October 2010 settlement agreement, and still pursue its fraud in the inducement claim.

¶38 Minerals argues that the arbitration award must be vacated because the arbitrators exceeded their authority under the contract by relying on non-Wisconsin cases. Minerals, however, does not identify any Wisconsin law that is inconsistent with the arbitrators' decision. Rather, Minerals takes the striking position that, even if the arbitrators' decision is completely consistent with Wisconsin law, the award must be vacated because the arbitrators cited non-Wisconsin authority. We are not persuaded.

¶39 Minerals relies on ***Edstrom Industries, Inc. v. Companion Life Insurance Co.***, 516 F.3d 546 (7th Cir. 2008), but ***Edstrom*** does not support Minerals' argument. In ***Edstrom***, the problem with the arbitrator's decision was that the arbitrator ignored an applicable Wisconsin statute despite a Wisconsin choice-of-law provision. *See* ***id.*** at 549, 552-53. For similar reasons, we are not persuaded by Minerals' reliance on ***BEM I, L.L.C. v. Anthropologie, Inc.***, 301 F.3d 548 (7th Cir. 2002). As we read both cases, Minerals needed to identify some way in which the arbitrators rejected Wisconsin law in favor of different law from another state. *See* ***Edstrom***, 516 F.3d at 552-53; ***BEM I***, 301 F.3d at 554.

¶40 In sum, nothing in Minerals' argument persuades us that the arbitrators failed to meet their obligation to act in accordance with Wisconsin law.

4. Parties' Obligation To Arbitrate After Superior's Termination Of The Contract

¶41 Minerals argues that Superior's August 2009 termination of the parties' contract ended any contractual obligation to arbitrate. Therefore,

according to Minerals, the award must be vacated. Minerals' argument fails for two reasons.[4]

¶42 First, we conclude that Minerals forfeited this argument because Minerals was the party that originally initiated arbitration after Superior terminated the contract. If Minerals thought that Superior's August 2009 termination ended the parties' obligation to arbitrate, then Minerals should not have initiated arbitration.

¶43 Second, even if this argument were not forfeited, Minerals' argument is not a reasonable interpretation of the contract. The arbitration provision is not limited to the duration of the contractual relationship. Rather, the contract requires the parties to arbitrate "*any* controversy, claim, *question, disagreement or dispute* … arising out of *or relating to this Agreement, or the relationship between the parties*" (emphasis added).

¶44 Minerals' reliance on ***Litton Financial Printing Division v. NLRB***, 501 U.S. 190 (1991), is misplaced. The Supreme Court in that case interpreted narrower language in an expired collective bargaining agreement that required arbitration of disputes arising "under the contract." ***Id.*** at 193-94, 205-06, 209. Here, in contrast, the pertinent language is much broader, as indicated above.

[4] Minerals may be arguing in the alternative that, even if Superior's August 2009 termination of the contract did not end the obligation to arbitrate, the October 2010 settlement agreement ended that obligation. If so, we consider this argument undeveloped, and do not address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments). Even if we were to address the argument, however, we would reject it for the reasons explained in section 2., ¶36, above.

5. Service Of Arbitration Demand On Edwards And Cote

¶45 Minerals argues that Superior never personally served Edwards and Cote with an arbitration demand and that Superior's demand did not clearly indicate that Superior was seeking relief against the two men as individuals. According to Minerals, the circuit court was therefore required to vacate the award as against Edwards and Cote. We are again not persuaded.

¶46 Minerals admits that the circuit court made a factual finding that Edwards and Cote "had the same notices and actual knowledge [that] Minerals [had] since they were the only two principals acting on behalf of [Minerals]," and Minerals does not demonstrate that this finding is clearly erroneous. Given these facts, it is not clear to us on what basis the award could be vacated as against Edwards and Cote. Minerals points to no arbitration law or arbitration rule requiring this result under circumstances like the ones here.

¶47 Minerals cites cases pertaining to personal jurisdiction over a party to an action *in court*, but Minerals does not persuade us that those cases are controlling for purposes of an arbitration proceeding.[5] Minerals asserts that "[t]he same [rule requiring personal service regardless of actual knowledge] holds true in confirmation of an arbitration award." But the only case that Minerals cites for that assertion is ***In re Lauratex Textile Corp.***, 37 A.D.2d 540, 322 N.Y.S.2d 76 (N.Y. App. Div. 1971). ***Lauratex*** does not, so far as we can tell, support the proposition. Indeed, Minerals asserts in a parenthetical that the ***Lauratex*** court held that an award could not be confirmed against a business partner who was not

[5] Those cases are ***Zenith Radio Corp. v. Hazeltine Research, Inc.***, 395 U.S. 100 (1969); ***Span v. Span***, 52 Wis. 2d 786, 191 N.W.2d 209 (1971); ***Heaston v. Austin***, 47 Wis. 2d 67, 176 N.W.2d 309 (1970); ***Howard v. Preston***, 30 Wis. 2d 663, 142 N.W.2d 178 (1966); and ***Pavlic v. Woodrum***, 169 Wis. 2d 585, 486 N.W.2d 533 (Ct. App. 1992).

named as a party in an arbitration demand, but it appears to us that the court held just the opposite—that enforcement of an arbitration award against an individual who was not named as a party in the arbitration proceeding but was later discovered to be a business partner of a named party was proper. *See* ***id.*** at 540-41. The court granted relief against the individual who had not been named. ***Id.***[6]

6. Arbitrability Of Fraud In The Inducement Claim

¶48 Minerals argues that the award should be vacated because fraud in the inducement claims are not, in general, arbitrable. However, the cases Minerals provides to support this argument suggest instead that the arbitrability of fraud and certain other tort claims depends on the pertinent contract language and facts of the claim. And, Minerals does not demonstrate that any of the cases involve contract language and facts like those here.

¶49 To illustrate, Minerals relies heavily on ***Midwest Window Systems, Inc. v. Amcor Industries, Inc.***, 630 F.2d 535 (7th Cir. 1980). The fraud in that case related to promissory notes separate from the original contract, and the original contract provided that the parties would arbitrate disputes "concerning the interpretation or application" of the contract. *See* ***id.*** at 537. Obviously, that arbitration clause was narrower than the one here. And, it is readily apparent that a fraud claim relating to promissory notes could reasonably be viewed as something other than an issue "concerning the interpretation or application" of the original contract. Here, in contrast, Minerals much more broadly contracted to

[6] In a footnote in its briefing, Minerals makes what appears to be a stand-alone argument regarding lack of proper service of the award on Edwards. This is not a developed argument, so we do not address it further. *See* ***Pettit***, 171 Wis. 2d at 646-47.

arbitrate "any controversy, claim, question, disagreement or dispute … arising out of or relating to this Agreement, or the relationship between the parties."

7. Superior's Failure To Request Prejudgment Interest During Arbitration

¶50 In a two-paragraph argument, Minerals asserts that the circuit court erred by awarding prejudgment interest because Superior did not preserve a request for such interest during the arbitration. Minerals cites ***Finkenbinder v. State Farm Mutual Auto Insurance Co.***, 215 Wis. 2d 145, 572 N.W.2d 501 (Ct. App. 1997), for the proposition that "claims of prejudgment interest are waived if not raised during an arbitration."

¶51 We question whether ***Finkenbinder*** stands for this broad proposition. Even if it does, however, this proposition does not mean that a circuit court may not choose to award prejudgment interest, regardless of waiver. The so-called "waiver rule" (more correctly termed the "forfeiture rule") does not bind the court; it is a rule of judicial administration. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612; ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶17, 273 Wis. 2d 76, 681 N.W.2d 190.

¶52 Moreover, Minerals fails to address a Superior argument, reflected in the circuit court's reasoning, that the Federal Arbitration Act allows prejudgment interest in this case. This failure on the part of Minerals is an independent ground justifying rejection of Minerals' argument. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in response brief may be taken as a concession).

8. Arbitrators' Authority To Impose $10,000 Sanction

¶53 As indicated above, the arbitrators awarded a $10,000 sanction against Minerals after concluding that Minerals' arguments were mostly frivolous. The arbitrators stated that "[i]t is difficult to imagine a case, other than one involving blatant perjury, where the imposition of sanctions would be more appropriate." The arbitrators explained that they were prepared to award a much larger sanction, but limited the amount to $10,000 because they had already awarded a substantial amount of attorney's fees and expenses to Superior.

¶54 Minerals argues that the arbitrators lacked authority to impose *any* sanction. Minerals asserts that the parties' contract does not expressly provide for sanctions and that the applicable arbitration rule limits the arbitration award to relief "within the scope of the agreement of the parties."

¶55 Superior responds that Minerals omits a key portion of the rule, which provides more fully that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." In addition, Superior argues that courts have widely recognized that this arbitration rule empowers arbitrators to award a sanction. Superior cites a number of cases from multiple jurisdictions in support.

¶56 Minerals fails to reply to Superior's arguments, and we take that as a concession. *See* ***id.*** We therefore conclude that the arbitrators had authority to award the sanction.

9. Circuit Court's Authority To Award Post-Arbitration Attorney's Fees, Costs, and Interest—Texas Law

¶57 Minerals argues that the circuit court lacked authority to award post-arbitration attorney's fees, costs, and interest because all such relief results in "impermissibly modifying" the arbitration award. Minerals cites two Texas cases

for support. Minerals merely asserts, without further explanation, that "Texas law is applicable since the guaranty of Minerals, Edwards and Cote was governed by Texas law."

¶58 Putting aside whether the two Texas cases actually support Minerals' position, Minerals' Texas-law-applies argument is plainly undeveloped. We therefore address this argument no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

10. Circuit Court's Authority To Award Post-Arbitration Attorney's Fees, Costs, and Interest—The Parties' Contract

¶59 On a closely related issue, Minerals argues that the circuit court lacked authority to award post-arbitration fees and costs for a different reason. Specifically, according to Minerals, section 8.5 of the parties' contract limits recoverable expenses to pre-award expenses of arbitration.

¶60 Superior responds that the circuit court correctly relied on section 10.9 of the contract to award post-arbitration expenses. We agree with the circuit court and Superior.

¶61 The two contract sections provide, in pertinent part, as follows:

> 8.5 **The Arbitration Award** …. The arbitrator(s) shall provide a binding decision …. The prevailing party … shall be entitled to all fees and costs associated with the arbitration. Costs and fees mean all reasonable pre-award expenses of the arbitration ….
>
> ….
>
> 10.9 **Attorneys' Fees**.... In any action brought pursuant to this Agreement, the prevailing party shall be entitled to recovery of its costs and expenses, including reasonable attorneys' fees.

Even if section 8.5, standing alone, could be read to support Minerals' argument, section 10.9 makes plain that a prevailing party is entitled to costs and expenses, including attorney's fees, for "any action."

¶62 Minerals asserts that a confirmation proceeding is not an "action," but Minerals fails to support this assertion with any explanation based on the contract's language or any legal authority. Minerals' bald assertion is unpersuasive.

11. Arbitrator Myse's Prior Relationship With One Of Superior's Attorneys

¶63 Minerals argues that the circuit court should have vacated the arbitration award based on arbitrator Myse's failure to timely disclose a prior relationship with one of Superior's attorneys. The attorney previously represented the Government Accountability Board (GAB) during a time when Myse chaired the board.

¶64 It is undisputed that Myse disclosed the relationship at the December 4, 2010 hearing that Minerals declined to attend. Minerals' briefing is unclear as to when Minerals first actually knew of the relationship. Minerals argues, however, that Myse's failure to disclose earlier constituted arbitrator misconduct and denied Minerals its right to object and to a fundamentally fair hearing. We reject Minerals' argument.

¶65 As Superior explains, the circuit court provided several reasons for rejecting Minerals' argument. We will summarize the four main reasons.

¶66 First, the circuit court concluded that arbitrator Myse was not obligated to disclose the relationship. The court acknowledged the disclosure rule

that Minerals relied on, but reasoned that the rule requires disclosure only of a relationship likely to give rise to "justifiable doubt" about the arbitrator's impartiality. The court concluded that there was no justifiable doubt as to Myse's impartiality. The court determined, based on the following detailed findings of fact, that the relationship between Myse and the attorney was brief and limited:

- Myse was not the individual who hired the attorney to represent the GAB;
- The representation pertained to a single lawsuit involving the GAB's statutory obligations;
- The suit sought no relief personally against Myse, and Myse had no personal stake in the litigation or exposure to personal liability;
- Myse was not paying the attorney's fees;
- Myse had no other business or personal relationships with the attorney;
- Myse met the attorney as part of the representation only once, when the attorney attended a GAB meeting and gave a status report on the suit; and
- Myse's relationship with the attorney was not close in time to the arbitration.

¶67 Second, the circuit court reasoned that this was not a true "non-disclosure" case because arbitrator Myse disclosed his relationship at the December 4, 2010 hearing. The court concluded that Minerals' "absence by choice from the hearing … cannot render ineffective Judge Myse's disclosure." We understand this part of the court's reasoning to be a conclusion that Minerals forfeited its objection to Myse's alleged partiality by Minerals' absence at the hearing.

¶68 Third, the circuit court cited case law holding that a failure to make a required disclosure or to delay a required disclosure is not automatic grounds to vacate an award. Rather, the party challenging the award must demonstrate that the undisclosed relationship can reasonably be viewed as evidencing bias. The court concluded that Minerals failed to demonstrate bias.

¶69 Fourth, the circuit court concluded that Minerals' challenge to arbitrator Myse's impartiality lacked "credibility" because Minerals knowingly acquiesced to arbitrator Nichol's service as an arbitrator even though Nichol was also a GAB member during the time that the attorney in question represented the GAB. We understand this part of the court's reasoning to be a second, independent ground for concluding that Minerals forfeited its objection to Myse's alleged partiality.

¶70 Minerals fails to meaningfully address the circuit court's reasoning. True, Minerals does argue that the court erred in its third reason because, under Texas law, bias is "established from the nondisclosure itself," and the nondisclosure requires the court to vacate the award. But Minerals again fails to make a developed argument as to why Texas law applies. More broadly, Minerals' argument is undeveloped because it fails to explain why the circuit court erred in rejecting Minerals' claim of bias against arbitrator Myse on any, let alone all, of the grounds the circuit court discussed, and we see no obvious weakness in any of the grounds. Accordingly, we end our analysis of this issue here. *See* ***Pettit***, 171 Wis. 2d at 646-47.

12. Arbitrators' "Discussion" Of Minerals' Refusal To Pay Arbitration Fees

¶71 Minerals' next argument relates to its refusal to pay arbitration fees and whether the arbitrators' "discussion" of Minerals' refusal showed bias. We reject the argument.

¶72 At some point in advance of the December 4, 2010 hearing, Minerals refused to pay certain arbitrator fees. So far as we can discern, this refusal was related to Minerals' position that the arbitrators lacked jurisdiction to decide Minerals' claim that the October 2010 settlement agreement was fraudulently induced. Minerals points to the arbitrators' discussion of Minerals' failure to pay. More specifically, Minerals points to communications between the American Arbitration Association and an arbitrator and to a brief reference to the fees topic on the record during the course of the December 4 hearing, which, to repeat, Minerals declined to attend.

¶73 Minerals advances a per se bias rule relating to "discussion" of arbitrator fees. More specifically, Minerals argues that "discussion of past due fees and payments with arbitrators prior to an arbitration hearing as well as after a hearing ha[s] consistently been held to infect the arbitrators' ability to be impartial and if such discussions occur, awards must be vacated even if no actual bias is shown." Minerals, however, does not provide persuasive legal underpinnings for its argument.

¶74 The only case Minerals cites to support its per-se-bias argument is ***In Matter of Grendi v. LNL Construction Management***, 175 A.D.2d 775, 573 N.Y.S.2d 515 (N.Y. App. Div. 1991). ***Grendi*** contains almost no pertinent reasoning and relies on a case that is clearly distinguishable, ***In Matter of Catalyst***

Waste-to-Energy Corporation and City of Long Beach, 164 A.D.2d 817, 560 N.Y.S.2d 22 (N.Y. App. Div. 1990). *See* ***Grendi***, 175 A.D.2d at 777. In ***Catalyst***, the arbitrators requested a higher fee in the midst of proceedings, engaged in ex parte communications with the parties, and accepted additional fees from one party without the other party's knowledge. *See* ***Catalyst***, 164 A.D.2d at 818-19.

¶75 Apart from its per-se-bias argument, Minerals does not develop an argument as to how the arbitrators' communications about Minerals' refusal to pay fees show bias. Thus, we could end our analysis of this issue here. We note, however, that one of Minerals' factual assertions is inaccurate. Minerals asserts that one of the arbitrators sent an email to the Association "seeking a default judgment against Minerals for failure to pay arbitration fees." In fact, the email that Minerals points to shows that the arbitrator was inquiring as to whether, if Minerals failed to pay, the arbitrators should direct the parties to address whether that failure to pay should result in default.

13. Edwards' and Cote's Personal Liability Under The Guaranty

¶76 Minerals argues that Edwards and Cote are not personally liable for the arbitration award or circuit court judgment because the October 2010 settlement agreement satisfied Edwards' and Cote's obligations under the guaranty and released them from further personal liability. Superior responds that Edwards and Cote forfeited this argument by failing to make a written objection when Superior named them individually as parties to the arbitration. In addition, Superior argues that the arbitrators' interpretation of the guaranty and settlement agreement is beyond the scope of judicial review. *See* ***National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.***, 551 F.2d 136, 142 (7th Cir. 1977)

("[C]ourts are in agreement that arbitrators do not exceed their powers by misconstruing a contract.").

¶77 Minerals does not reply to Superior's forfeiture argument, but does reply as to our standard of review. Minerals argues that arbitrators exceed their powers when, as here, they interpret contractual language so that the arbitrators are, in effect, "amending" the contract. *See* ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n***, 118 Wis. 2d 707, 713, 348 N.W.2d 175 (1984).

¶78 We take Minerals' failure to reply on the forfeiture issue as a concession of forfeiture, at least as to the arbitration award. It is not clear to us that this forfeiture would apply to the circuit court judgment. Regardless, neither our uncertainty on that topic nor the parties' dispute as to the standard of review matters because we agree with the arbitrators and the circuit court that Edwards and Cote are personally liable under the guaranty.

¶79 The guaranty provides:

> 1.1 Guaranty. Each Guarantor, jointly and severally, hereby guarantees the payment and performance of *all obligations of [Minerals] under the Supply Agreement, including, without limitation, [Minerals'] obligations ... to refund the Prepayment Amount ...* provided, that the aggregate amount of the Guaranteed Obligations shall not exceed $4,000,000.
>
> ….
>
> 1.3 ... Each Guarantor's obligations under this Agreement will remain in full force and effect until the earlier of (i) satisfaction of all Guaranteed Obligations ….

(Emphasis added.)

¶80 As we understand it, Minerals' argument begins with the premise that these terms show that Edwards and Cote guaranteed nothing more than

Minerals' potential obligation to refund some or all of Superior's $4 million prepayment (the "refund obligation"), and, according to Minerals, the October 2010 settlement agreement released Edwards and Cote (and Minerals) from the refund obligation. Therefore, Minerals argues, the settlement agreement was a "satisfaction of [the] Guaranteed Obligations" under the terms of the guaranty.

¶81 The flaw in Minerals' argument is its premise. Edwards' and Cote's guaranty was not limited to the refund obligation. When arguing to the contrary, Minerals ignores the broad guaranty language stating that Edwards and Cote guaranty "all" of Minerals' obligations, "including, without limitation" the refund obligation. If Edwards and Cote had meant to limit their liability to the refund obligation, then they should not have signed a guaranty with such language. Minerals seems to believe that the $4 million cap on Edwards' and Cote's personal liability must mean the guaranty was only for the refund obligation, but nothing ties the liability cap solely to the refund obligation.

14. Whether Minerals Could Retain The $500,000 In Settlement Proceeds, Refuse To Perform Its Obligations Under The October 2010 Settlement Agreement, And Sue For Fraud

¶82 Minerals argues that the circuit court erred in concluding that Minerals was not free to both retain the $500,000 in settlement proceeds and sue Superior for fraudulently inducing Minerals into the October 2010 settlement agreement that required Superior to pay Minerals the $500,000 settlement amount. For reasons that are unclear to us, Minerals frames this argument in terms of circuit court error instead of arbitrator error. Minerals may be implying that the arbitrators failed to address the pertinent issue. If so, we disagree and we discuss this issue with reference to both the arbitrators' and the circuit court's decisions. We reject this Minerals argument for three reasons.

¶83 First, this Minerals argument is moot. As we have explained, the arbitrators expressly addressed and rejected Minerals' fraud claim on its merits. And, as we have also explained, Minerals does not persuade us that its fraud claim was not arbitrable. *See* section 6., *supra*. Thus, even if Minerals could bring a fraud claim while retaining the $500,000 settlement proceeds, that fraud claim has already been rejected.

¶84 Second, Minerals mischaracterizes the nature of the ruling. Neither the arbitrators nor the circuit court concluded, as Minerals seems to be saying, that a party may never both retain the benefits of a settlement and pursue a claim that the settlement was fraudulently induced. Rather, the arbitrators and the court concluded that in this case Minerals was barred from retaining the $500,000 and pursuing its fraud claim because Minerals otherwise failed to perform on obligations imposed on Minerals by the settlement agreement. Regardless whether Minerals could pursue a fraud claim in an effort to undo the settlement agreement, the arbitrators and the circuit court properly concluded that Minerals could not, in the mean time, accept the benefit of the settlement agreement without performing its obligations under the agreement.

¶85 Thus, Minerals is not persuasive when it cites cases that make statements such as this one: "The aggrieved party has the election of either rescission or *affirming* the contract and seeking damages." ***First Nat'l Bank & Trust Co. of Racine v. Notte***, 97 Wis. 2d 207, 225, 293 N.W.2d 530 (1980) (emphasis added). Minerals' reliance on such statements fails to recognize that the arbitrators and the circuit court concluded that Minerals did not affirm the October 2010 settlement agreement because Minerals did not perform its obligations under the agreement. Minerals may think that the arbitrators' or circuit court's decision is unclear on this point, but Minerals is wrong.

¶86 Third, as referenced above, Minerals does not explain why the arbitrators' decision on this issue is not controlling, even if the arbitrators erred in applying the law. Minerals fails to reply to Superior's argument that this type of error of law by arbitrators is not reviewable. *See* ***Nicolet High Sch. Dist.***, 118 Wis. 2d at 713 ("'The parties bargain for the judgment of the arbitrator—correct or incorrect—whether that judgment is one of fact or law.'" (quoted source omitted)). We take this failure to reply as a concession. *See* ***United Coop.***, 304 Wis. 2d 750, ¶39. We note that Minerals expressly concedes in its briefing on a different issue that a court will not overturn an arbitrator for "mere errors of judgment as to law or fact." Thus, we treat the arbitrators' decision on this issue as binding, and it does not matter if the circuit court erred in its interpretation of the law.

15. Calculation Of Fees And Costs

¶87 Finally, Minerals argues that the circuit court erred because it did not address "gross errors" that the arbitrators made in their calculation of fees and costs for the arbitration proceeding. More specifically, according to Minerals, the "gross error" is that the arbitrators included pre-settlement-agreement expenses in the award, contrary to the terms of the settlement. *See* ***Kadlec v. Kadlec***, 2004 WI App 84, ¶8, 272 Wis. 2d 373, 679 N.W.2d 914 ("'The rule that a court will not overturn an arbitration panel for mere errors of judgment as to law or fact does not mean that all errors will be tolerated.'" (quoted source and internal quotation marks omitted)).

¶88 Superior responds that Minerals forfeited this issue by failing to timely raise the issue in its motion to vacate the award. Superior also argues that, contrary to Minerals' assertion, the circuit court addressed the issue and made a specific fact finding on it.

¶89 Minerals again fails to reply, and we again take this failure as a concession. Moreover, even without the concession, we would agree with Superior. The circuit court addressed this issue and made the following finding: "Consistent with the terms of the settlement agreement, the [arbitrators] awarded no past attorneys fees or costs … for work done prior to October 4, 2010, the date when the [settlement] agreement was made …. [Their] award only looked forward from that date." We agree with Superior that Minerals fails to show that this finding is clearly erroneous.

Conclusion

¶90 In sum, for the reasons stated above, we affirm the circuit court's judgment confirming the arbitration award and awarding Superior additional expenses.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.