IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 3, 2023

CIC SERVICES, LLC v. SURESH PRABHU ET AL.

Appeal from the Circuit Court for Shelby County
No. CT-1000-22 Gina C. Higgins, Judge

No. W2022-01431-COA-R3-CV

This case involves a dispute arising from services provided by the appellee, CIC Services, LLC ("CIC"), a creator and manager of "captive" insurance companies, to the appellant corporation, SRM Group, Inc. ("SRM").[1] SRM hired CIC to form and manage two captive insurance companies to serve SRM in risk management, and the parties memorialized their relationship in two management agreements, one for each of the newly formed captive insurance companies. When CIC subsequently ended its contractual relationship with SRM for cause, SRM demanded arbitration pursuant to the arbitration clauses contained in the agreements. The arbitrator dismissed all of SRM's claims. CIC then demanded a second arbitration, seeking attorney's fees, expenses, and costs incurred during the first arbitration and stating claims for breach of contract and fraudulent inducement against SRM. The second arbitrator ultimately awarded to CIC $261,487.04 in attorney's fees, expenses, and costs incurred during the first arbitration proceeding, pursuant to the indemnity clauses in the parties' management agreements, and $137,337.50 in attorney's fees, expenses, and costs because CIC was the substantially prevailing party in the second arbitration. When SRM did not respond to CIC's demand for payment of this award, CIC moved for confirmation of the award in the Shelby County Circuit Court ("trial court"). SRM responded by filing a motion with the trial court to modify or vacate the award. After the parties fully briefed the issues, the trial court confirmed the award in full and concomitantly denied SRM's motion to modify or vacate. SRM timely appealed. Upon review, we affirm the trial court's confirmation of the arbitration award, determining that because appellant Suresh Prabhu voluntarily participated in both arbitrations without raising objection to the potential attachment of liability against him as an individual, Mr. Prabhu and SRM have waived objection to the attachment of individual liability to Mr. Prabhu. We further determine that the trial court properly denied SRM's motion to vacate the award because the second arbitrator acted within her discretion to direct the arbitration procedure and SRM has failed to show any of the criteria necessary to meet the high

[1] Captive insurance companies are wholly owned by their primary insured and provide insurance policies exclusively to their owners.

standard for vacatur pursuant to the Federal Arbitration Act or the Commercial Rules of the American Arbitration Association.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ARNOLD B. GOLDIN, J., joined.

Tom Walsh, Nashville, Tennessee, for the appellants, Suresh Prabhu; SRM Group, Inc.; Andra Insurance Company, Inc.; and St. Simons Insurance Company, Inc.

Lauren Paxton Roberts and Ashley Goins Alderson, Nashville, Tennessee, for the appellee, CIC Services, LLC.

OPINION

I. Factual and Procedural Background

Mr. Prabhu,[2] as President of SRM, sought to form two captive insurance companies, Andra Insurance Company, Inc. ("Andra") and St. Simons Insurance Company, Inc. ("St. Simons"), to provide risk management to SRM (Mr. Prabhu, SRM, Andra, and St. Simons will hereinafter be collectively referred to as "the SRM Parties"). To facilitate the formation of the captive insurance companies, SRM retained CIC to form and manage Andra and St. Simons. The SRM Parties and CIC entered into two contracts ("the Management Agreements") to govern CIC's management of Andra and St. Simons, which were formed in October 2014 and October 2016 respectively. Subsequently, Andra and St. Simons issued insurance policies to SRM under CIC's management.

According to CIC, it began to suspect that Mr. Prabhu and SRM were not submitting legitimate claims under the policies provided by Andra and St. Simons. CIC avers that it confronted Mr. Prabhu about this problem but that Mr. Prabhu continued to resist CIC's attempts to encourage him to make legitimate insurance claims. Instead, according to CIC, Mr. Prabhu filed a number of late claims under the policies and pressed for them to be paid, despite their untimeliness. For these reasons, CIC resigned as manager of Andra and St. Simons effective January 8, 2018. In turn, Mr. Prabhu demanded arbitration (the "First Arbitration") against CIC on behalf of the SRM Parties, raising claims of common law fraud, negligence, breach of fiduciary duty, breach of contract, and allegations under the

[2] We note that Mr. Prabhu's name is spelled interchangeably "Prabhu" and "Prahbu" throughout the technical record, sometimes with both spellings appearing in the same document. We have chosen the spelling "Prabhu" because that is the spelling used in the appellants' brief.

Tennessee Securities Act and the Racketeer Influenced and Corrupt Organization ("RICO") Act.

The substantially identical[3] arbitration clauses in the Management Agreements provide in pertinent part:

> [A]ny claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the American Arbitration Association, under the Arbitration Rules then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction . . . . This agreement shall be interpreted under the Federal Arbitration Act.

After a six-day hearing, the arbitrator issued a final award and judgment in the First Arbitration on October 30, 2019, wherein he concluded that the SRM Parties were not entitled to recover under any of their claims. The arbitrator acknowledged that the Management Agreements allowed for an award of attorney's fees to the prevailing party but elected not to award attorney's fees to CIC because the arbitrator found that CIC was not "blameless" in the breakdown of the relationship between CIC and the SRM Parties.

CIC subsequently demanded a second arbitration (the "Second Arbitration"), seeking an award of attorney's fees, costs, and expenses incurred during the First Arbitration pursuant to the indemnity clauses in the Management Agreements. The substantially identical[4] indemnity clauses of the Management Agreements provide as follows:

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[3] The October 10, 2016 Management Agreement, which the parties executed to form St. Simons, adds the following language, shown here in bold type, to the arbitration clause found in the previous Management Agreement executed on September 26, 2014: ". . . and any claim or dispute related to this AGREEMENT **or the circumstances of its initiation or execution . .** ." and "including the validity **or applicability** of this arbitration clause **or any forum selection clause,** shall be resolved . . . ." We find that the added language is not at issue here. Accordingly, we treat the arbitration clauses in the Management Agreements as substantially identical for the purpose of this opinion.

[4] The October 10, 2016 Management Agreement also adds the following language, shown here in bold type, to the indemnity clause found in the previous Management Agreement executed on September 26, 2014: ". . . that [CIC] provided legal, tax, **investment advisory** or accounting advice . . . that [SRM] did not **legitimately** need or desire . . . or that the CIC **was a sham or** was not a valid insurance company **for federal tax purposes or state law purposes or that the risks insured were not proper business risks or were not insurable risks or that there was insufficient risk distribution** . . . ." As with the arbitration clauses, we find that the added language in the later indemnity clause is not at issue here. Accordingly, we treat the indemnity clauses in the Management Agreements as substantially identical for the purpose of this opinion.

> To the fullest extent permitted by Law, [SRM] shall defend, indemnify and hold harmless [CIC and its affiliates], from and against all liabilities, damages, claims, demands, judgments, penalties, losses, costs, expenses, suits, actions or proceedings (including reasonable fees and disbursements of counsel) resulting from
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> (a) The violation of any Law by [SRM] or related entities; or
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> (b) Any allegation by any person or governmental or private entity that [CIC] provided legal, tax, or accounting advice or opinions to [SRM] or related entities by virtue of the services provided hereunder;
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> (c) Any allegation by any person or governmental or private entity that [SRM] did not need or desire the amounts or types of insurance policies that it purchased from the CIC at any time or that such policies were improperly priced or that the CIC was not a valid insurance company; or
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> (d) Arising as a result of or in connection with any failure on the part of [SRM] or any related entity to perform its obligations under this Agreement or the law or any negligent acts or omissions or willful misconduct of [SRM] or any related entity or anyone acting on its behalf . . . .

CIC also sought attorney's fees and expenses related to the Second Arbitration pursuant to the separate "fee shifting" or attorney's fees provisions in the Management Agreements. The identical fee shifting provisions of the Management Agreements provide:

> In any suit, proceeding, or action to enforce any term, condition, or covenant of this Agreement or to procure an adjudication or determination of the rights of any of the parties, the substantially prevailing party shall be entitled to recover from the other parties reasonable sums such as attorney's fees and costs and expenses in connection with such suit, proceeding, or action, including appeals, which sums shall be included in any judgment or decree entered therein.

In addition to seeking attorney's fees under the indemnity clauses and the fee shifting provisions in the Management Agreements, CIC also alleged breach of the Andra Management Agreement against Andra and SRM; breach of the St. Simons Management Agreement against St. Simons and SRM; and fraudulent inducement against Mr. Prabhu, SRM, and both captives, Andra and St. Simons.

The SRM Parties moved to dismiss CIC's arbitration demand as barred by the doctrine of *res judicata*, urging that CIC could have filed a counterclaim in the First Arbitration but failed to do so. In an order dated February 17, 2021, the second arbitrator rejected the SRM Parties' *res judicata* argument, noting that although "CIC did not file a counterclaim for breach of the management agreements in the original arbitration[,]" it was "abundantly clear that the [first] arbitrator determined that SRM breached the management agreements." Also in the February 17, 2021 order, the second arbitrator dismissed CIC's claim of fraudulent inducement against the SRM Parties. Having resolved those issues, the second arbitrator determined that the Second Arbitration would proceed on the "applicability of the indemnity provisions of the management contracts; on the issue of damages, if any, to be awarded under the [indemnity provisions]; and on the issue of damages under the attorney's fee provision of the management contract with respect to this [second] arbitration."

In an order dated May 7, 2021, the second arbitrator denied the SRM Parties' motion to file a counterclaim in the Second Arbitration, stating that "SRM was the original claimant in this matter and could have asserted any basis for its claims." As such, the second arbitrator found that any new claims brought by SRM were waived when the SRM Parties failed to raise them as the claimants in the First Arbitration.

In a third order, dated November 30, 2021, the second arbitrator awarded CIC $261,487.04 in attorney's fees, expenses, and costs related to the First Arbitration, pursuant to the indemnity provisions of the Management Agreements, and further determined that CIC would be entitled to an award of reasonable attorney's fees, expenses, and costs as the substantially prevailing party in the Second Arbitration. On January 21, 2022, after reviewing the parties' proof and argument as to fees and costs incurred, the second arbitrator issued a fourth and final order granting CIC an award for attorney's fees, expenses, and costs from the Second Arbitration in the amount of $137,337.50 pursuant to the fee shifting provisions in the Management Agreements.

On February 10, 2022, CIC sent the SRM Parties a demand letter seeking payment of the total $398,824.54 award ("the Second Arbitration Award"). On March 15, 2022, CIC filed a motion in the trial court seeking a judgment confirming the Second Arbitration Award. On April 21, 2022, the SRM Parties moved to vacate or modify the Second Arbitration Award. On September 16, 2022, the trial court issued an order confirming the Second Arbitration Award and denying the SRM Parties' motion to vacate and/or modify. The SRM Parties timely appealed the trial court's confirmation of the Second Arbitration Award.

II. Issues Presented

The SRM Parties have raised two issues on appeal, which we have restated as follows:

1. Whether the trial court abused its discretion by confirming an arbitration award that attached individual liability to Mr. Prabhu for breach of the Management Agreements when Mr. Prabhu was not a party to those agreements.

2. Whether the trial court abused its discretion by confirming an arbitration award wherein the arbitrator exceeded her powers, demonstrated partiality, and acted in manifest disregard for the law by refusing to allow the SRM Parties to conduct discovery, proffer witness testimony, or participate in a full hearing.

III. Standard of Review

Our Supreme Court has explained the deferential standard of review that should be used by this Court in reviewing a trial court's decision to confirm an arbitration award:

> Judicial review of arbitration decisions is statutorily limited, and any judicial review must be conducted within those limits. Nevertheless, the standard of review to be used by the intermediate court in reviewing a trial court's decision that refuses to vacate, or confirms, an arbitrator's award is an issue. Most of these controversies will be determined by the facts, and the intermediate court should accept those facts as found unless clearly erroneous. *First Options of Chicago*[, *Inc. v. Kaplan*], 514 U.S. [938, 947-8], 115 S. Ct.[1920,] 1926 .
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> Matters of law, if not able to be resolved by resort to the controlling statutes, should be considered independently, with the utmost caution, and in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution.[5]

Arnold v. Morgan Keegan & Co., 914 S.W.2d 445, 450 (Tenn. 1996).

[5] In *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.,* 320 S.W.3d 252, 258 n. 4 (Tenn. 2010), our Supreme Court clarified the standard of review set forth in *Arnold* regarding matters of law in arbitration cases:

> To the extent that our opinion in *Arnold* can be read to adopt a standard of review of issues of law other than de novo, we take this opportunity to clarify our holding. We adopt the statement of the United States Supreme Court in *First Options of Chicago, Inc*. [*v. Kaplan*, 514 U.S. 938, 948 (1995)] that "ordinary, not special, standards" of appellate review should apply in arbitration cases and that appellate courts need not "give *extra* leeway to district courts that uphold arbitrators."

In adopting this deferential standard, the *Arnold* Court reasoned that "[o]nce an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award." *Id*. (quoting *State ex rel. Hooten Constr. Co. v. Borsberry Constr. Co.*, 769 P.2d 726, 727 (N.M. 1989)). "Courts are justified in exercising great caution when asked to set aside an arbitration award, which is the product of the theoretically informal, speedy and inexpensive process of arbitration, freely chosen by the parties." *Id*.

When, as here, the parties have contracted to be bound in arbitration proceedings by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (2002) (the "FAA"), "Section [Ten] of the FAA provides the exclusive grounds for vacating an arbitration award."[6] *See Thomas Builders, Inc. v. CKF Excavating, LLC*, No. M2021-00843-COA-R3-CV, 2023 WL 3792712, at *4 (Tenn. Ct. App. June 2, 2023) (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc*., 552 U.S. 576, 586 (2008); *Grain v. Trinity Health, Mercy Health Servs. Inc.,* 551 F.3d 374, 378 (6th Cir. 2008)). Section Ten of the FAA, codified at 9 U.S.C. § 10, provides that a court may vacate an arbitration award only in the following circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
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> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[6] In this matter, the Management Agreements provide that any claim or dispute shall be interpreted under the Federal Arbitration Act. In their brief on appeal, the SRM Parties quote provisions from both the FAA and the Tennessee Uniform Arbitration Act, codified at Tennessee Code Annotated §§ 29-5-301, *et seq.* ("TUAA"), as to the scope of judicial review of an arbitration award. However, throughout their argument, the SRM Parties state that both statutes are "substantially identical." CIC refers to the parties' express agreement that arbitration is governed by the FAA and accordingly relies solely on the federal standard of review. Both parties cite 9 U.S.C. § 10 of the FAA as controlling. Because both parties seek review pursuant to the FAA and because the Management Agreements expressly provide that the FAA governs any arbitration, we apply the FAA to our review of the trial court's confirmation of the Second Arbitration Award.

9 U.S.C. § 10 (a). The burden of proof required of the movant who seeks vacatur of an arbitration award pursuant to this section "is very great." *Thomas Builders*, 2023 WL 3792712, at *4 (quoting *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990)).

IV. Attachment of Individual Liability to Mr. Prabhu

The SRM Parties argue that because "Appellant Prabhu cannot be held liable under a contract to which he is not a party . . . the trial court's confirmation of the [Second Arbitration A]ward is clearly erroneous, an abuse of discretion, and should be reversed." In support of this argument, the SRM Parties present the same points verbatim that they proffered before the trial court. Specifically, they argue that Mr. Prabhu was never a party to the Management Agreements because those contracts were executed between CIC and SRM rather than by Mr. Prabhu as an individual. Consequently, the SRM Parties posit that the Second Arbitration Award should not have attached individual liability to Mr. Prabhu predicated on damages arising from Management Agreements to which he was not a party. According to the SRM Parties, the Second Arbitration Award should be modified pursuant to the FAA provision governing modification of arbitration awards because the inclusion of Mr. Prabhu in the award was an "evident mistake" in the description of the parties; was "imperfect in a matter of form" because it attached liability to Mr. Prabhu; and was "invalid" to the extent it relied upon "matters not submitted, namely, the liability of [Mr.] Prabhu under the contracts." *See* 9 U.S.C. § 11.

CIC counters that Mr. Prabhu waived any objection to an arbitration award being entered against him individually when he voluntarily participated as an individual in both arbitration proceedings and never objected to being personally named as a litigant in both arbitrations until after CIC moved to confirm the Second Arbitration Award. CIC further argues that even if Mr. Prabhu had not waived his right to challenge the arbitrators' jurisdiction concerning him individually, he executed both Management Agreements on behalf of SRM and maintained complete control over SRM, Andra, and St. Simons at all relevant times. As such, CIC posits that all three companies were merely alter egos of Mr. Prabhu. In support of its alter ego argument, CIC points to the First Arbitration award wherein the arbitrator expressly found that "[f]or purposes of this Award, SRM, Andra and St. Simons can be considered alter egos of Suresh Prabhu." Mr. Prabhu did not object to this statement during either arbitration. For these reasons, CIC contends that Mr. Prabhu cannot now credibly argue that the Second Arbitration Award does not apply to him.

Upon thorough review, we determine that the trial court correctly declined to modify the Second Arbitration Award to exclude Mr. Prabhu from individual liability. In so ruling, the trial court considered the motions, responses, and arguments of counsel and found that there was a "rational basis for the arbitrator's decisions[.]" The SRM Parties do not provide any argument or proof in the record that would justify disturbing the trial court's findings.

Moreover, we agree with CIC that the SRM Parties have waived objection to the attachment of individual liability to Mr. Prabhu in the arbitration proceedings. Mr. Prabhu intentionally and voluntarily named himself as an individual claimant in the First Arbitration, and voluntarily participated in his individual capacity in both arbitration proceedings. This Court has determined that "[a]s a general rule, a party waives the right to a judicial determination of an issue where the party has participated in arbitration of the issues without raising any objection." *Lee Warehouse Ltd. P'ship by Warehouses, Inc. v. Jepco Constr. Co*., No. E1999-01944-COA-R3-CV, 2000 WL 760747, at *1 (Tenn. Ct. App. June 13, 2000) (internal citations omitted).

Here, Mr. Prabhu participated fully in both arbitration proceedings in his individual capacity without raising any objection to being named as an individual. Although the SRM Parties' initial demand for arbitration is not included in the record, the First Arbitration award, dated October 30, 2019, refers to their demand as follows, clearly including Mr. Prabhu as an individual claimant:

> In this proceeding the claimants SRM Group, Inc. ("SRM"), Andra Insurance Company, Inc. ("Andra"), St. Simons Insurance Company, Inc. ("St. Simons") and Suresh Prabhu (all collectively "the claimants") assert various claims against the respondents CIC Services, LLC, Bryan Ridgway, Tom King, Sean King and Shawn Holland ("the respondents").

(Emphasis added.) The First Arbitration award further delineated the SRM Parties' claims, which included common law fraud, negligence, breach of fiduciary duty, breach of contract, and claims pursuant to the Tennessee Securities Act and RICO, all of which were claims arising from the SRM Parties' interpretation of the Management Agreements. In the First Arbitration award, the arbitrator also stated that "[f]or purposes of this Award, SRM, Andra and St. Simons can be considered alter egos of Suresh Prabhu."

The record fails to demonstrate that Mr. Prabhu ever objected to being named individually as a claimant during the First Arbitration or that he ever objected to being identified as an alter ego of SRM, Andra, and St. Simons in the First Arbitration award. In fact, it was Mr. Prabhu, whom the first arbitrator characterized as "a very intelligent person with the ability to understand complex business issues and documents[,]" who initiated the First Arbitration award on behalf of the three companies as well as himself in an individual capacity.

In its subsequent demand for arbitration, CIC named Mr. Prabhu as an individual respondent along with SRM, Andra, and St. Simons. Mr. Prabhu participated for nearly a year in the Second Arbitration proceedings, which, like the First Arbitration, centered upon an interpretation of the Management Agreements. The record fails to demonstrate that Mr. Prabhu raised any objection to being named as an individual respondent in those proceedings. Nor did Mr. Prabhu ever assert, in either arbitration, that he should not be

found liable because he was not a party to the Management Agreements. Only after entry of the Second Arbitration Award in favor of CIC did Mr. Prabhu raise, for the first time, the argument that he as an individual was not a party to the Management Agreements.

As this Court has stated, "[a] party may not take his chances in arbitration and then, if dissatisfied with the results, seek relief in the courts." *Lee Warehouse*, 2000 WL 760747, at *1. Mr. Prabhu, as a named individual along with SRM, Andra, and St. Simons, "took his chances" with arbitration by initiating the First Arbitration as an individual claimant along with the three companies and did likewise by fully participating in the Second Arbitration without objection. Mr. Prabhu cannot now seek to overturn the Second Arbitration Award simply because he is dissatisfied with the results. Therefore, Mr. Prabhu and the SRM Parties have waived objection to Mr. Prabhu being found individually liable in the Second Arbitration Award. Accordingly, the first issue presented on appeal is deemed unavailing.

V. Arbitrator's Discretion to Direct Discovery and Procedure

The SRM Parties argue that the trial court's confirmation of the Second Arbitration Award must be reversed as "clearly erroneous" and an "abuse of discretion" because the second arbitrator "exceeded her powers, demonstrated partiality, and acted in manifest disregard for the law by refusing to allow [the SRM Parties] to conduct discovery, proffer witness testimony, or participate in a full hearing." According to the SRM Parties, "[t]he Second Arbitrator limited the evidence upon which she rendered the [Second Arbitration] Award by excluding discovery, witness testimony, and an evidentiary hearing and relying solely upon the rulings and findings of the First [Arbitration] Award." The SRM Parties claim that in denying them the opportunity to conduct discovery or proffer witness testimony, the second arbitrator prevented them "from having the opportunity to adequately defend themselves in the Second Arbitration . . . ." According to the SRM Parties, these assignments of error "can be derived from a cursory review of the [second arbitrator's] orders[.]"

The SRM Parties appear to invoke 9 U.S.C. § 10(a)(2) in advancing the postulate that the second arbitrator demonstrated "evident partiality" in favor of CIC by disallowing discovery and denying the SRM Parties an opportunity to proffer witness testimony or conduct an evidentiary hearing. *See* 9 U.S.C. § 10(a)(2) (stating that a court may vacate an arbitration award "where there was evident partiality or corruption in the arbitrators . . . ."). Evident partiality is found "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 325 (6th Cir. 1998) (quoting *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989)). Here, the record is devoid of any support for the SRM Parties' bare assertion that the second arbitrator was biased in favor of CIC. On the contrary, a review of the second arbitrator's orders reveals that she denied CIC's claim for fraudulent inducement against the SRM Parties in her February 17, 2021 order, a ruling that cuts

against the SRM Parties' claim of partiality. Accordingly, a reasonable person would not "have to conclude" that the second arbitrator was partial to CIC. *See Anderson*, 166 F.3d at 325.

The SRM Parties also invoke 9 U.S.C. § 10(a)(4), claiming that the second arbitrator "exceeded her powers by allowing CIC's second bite at the apple regarding attorney fees, and did not allow for discovery, witness testimony, or an evidentiary hearing." *See* 9 U.S.C. § 10(a)(4) (a trial court may vacate an arbitration award "where the arbitrators exceeded their powers . . . ."). In *Solvay Pharm., Inc. v. Duramed Pharm., Inc*., the Sixth Circuit Court of Appeals explained:

> The burden of proving that arbitrators exceeded their authority is very great[, and] courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed.

442 F.3d 471, 476 (6th Cir. 2006) (quoting *Beacon Journal Pub. Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 599 (6th Cir. 1997)) (internal citation omitted). The *Solvay* Court further explained: "Courts must refrain from reversing an arbitrator simply because the court disagrees with the result or believes the arbitrator made a serious *legal* or factual error." *Id*. (quoting and adding emphasis to *United Paperworkers Int'l Union v. Misco, Inc*., 484 U.S. 29, 38 (1987)).

Here, the SRM Parties fail to proffer any argument that the second arbitrator lacked authority to award attorney's fees. Moreover, they cannot dispute that the parties agreed to submit to binding arbitration and that the Management Agreements provided for the potential award of attorney's fees pursuant to both the indemnity clauses and the fee shifting provisions contained therein. Thus, we determine that the second arbitrator did not exceed her powers in granting attorney's fees to CIC under either the indemnity clauses or the fee shifting provisions.

The SRM Parties further assert that the trial court should have vacated the Second Arbitration Award for failure to permit discovery, witness testimony, or an evidentiary hearing. In advancing this argument, the SRM Parties invoke 9 U.S.C. § 10(a)(3), which provides that vacatur is warranted "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy."

The FAA is silent concerning presentation of evidence and discovery requirements in arbitration proceedings. However, the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association (the "AAA Commercial Rules"),[7] by

[7] All citations to the AAA Commercial Rules in this opinion are taken from the current version of the AAA Commercial Rules, where were amended and effective September 1, 2022. The substantive rules quoted

which the parties contracted to abide, grant arbitrators great latitude in how they conduct discovery and evidentiary hearings. Regarding the presentation of evidence, the AAA Commercial Rules provide:

> The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. . . .

AAA Commercial Rules, R-35(a) (emphasis added). This rule grants the arbitrator authority to determine what, if any, evidence is relevant and material to the dispute and explicitly states that the arbitrator is not bound by state or federal rules of evidence in making these decisions. The SRM Parties contend that they requested an opportunity to proffer evidence at an evidentiary hearing; however, the record is devoid of any such request. Moreover, even had the SRM Parties demonstrated that they had requested an evidentiary hearing and the request was denied, such decision is within the arbitrator's discretion. *See* AAA Commercial Rules, R-35(a); *see also Sneyd v. Washington Cnty*., 387 S.W.3d 1, 7 (Tenn. Ct. App. 2012) ("The term 'may' is 'permissive and operates to confer a discretion.'" (quoting *Huey v. King*, 415 S.W.2d 136, 139 (Tenn. 1967))).

Regarding the exchange of discovery documents, the AAA Commercial Rules provide:

> *Authority of arbitrator*. The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.

AAA Commercial Rules, R-23(a). The rule goes on to state that the arbitrator "may" require parties to exchange discovery during an arbitration proceeding. AAA Commercial Rules, R-23(b). The AAA Commercial Rules also grant the arbitrator general discretion to vary the procedure of arbitration proceedings, "provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." *See* AAA Commercial Rules, R-33 (a).

Inasmuch as the AAA Commercial Rules grant an arbitrator discretion to direct the exchange of discovery, the presentation of evidence, and the manner in which hearings are conducted, the second arbitrator was not required to adhere strictly to certain rules of civil procedure or of evidence. *See Barrick Enters., Inc. v. Crescent Petroleum, Inc*., 496 F.

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herein were in effect at the time the arbitrations at issue here took place, but previous versions of the AAA Commercial Rules may list them under different number headings.

App'x 614, 620 (6th Cir. 2012) ("[A]rbitrators are not bound by formal rules of procedure and evidence." (quoting *Nat'l Post Office Mailhandlers v. United States Postal Serv.*, 751 F.2d 834, 841 (6th Cir.1985))). Moreover, although the SRM Parties insist that the second arbitrator was required to conduct an evidentiary hearing, the SRM Parties supply no authority to support this assertion, and neither the FAA[8] nor the AAA Commercial Rules contain provisions requiring the arbitrator to conduct an evidentiary hearing.

The SRM Parties assert that the second arbitrator manifested partiality against them by denying their requests to conduct discovery, but, again, nothing in the record demonstrates that such a request was made. Assuming, *arguendo*, that the second arbitrator had rejected a petition for discovery, such action would not suffice to show that the arbitrator exceeded her powers, acted with partiality against the SRM Parties, or exhibited manifest disregard for the law. In short, the record fails to establish that the second arbitrator acted in a manner so inconsistent with the AAA Commercial Rules or the FAA that vacatur was warranted. Accordingly, we find that the trial court's confirmation of the award was neither clearly erroneous nor an abuse of discretion.

The SRM Parties also contend that the second arbitrator treated them unfairly when she applied "alarmingly inconsistent standards to the parties; by ruling on one hand that the decision in the First Arbitration did not constitute res judicata as against CIC's claims, while simultaneously ruling that the First Award did constitute res judicata as against the [SRM Parties]." They further contend that the second arbitrator's decision to deny their motion to dismiss on *res judicata* grounds, while also dismissing their request to file a counterclaim, "demonstrates her overreaching and partiality in favor of CIC."

We discern no error in the trial court's confirmation of the Second Arbitration Award based on the SRM Parties' claims that the second arbitrator issued "inconsistent" opinions concerning the doctrine of *res judicata*. In her February 17, 2021 order, the second arbitrator conducted an in-depth analysis of the first arbitrator's findings, and from this analysis she determined that the first arbitrator had concluded that the SRM Parties had breached the Management Agreements. Nothing in this order exhibits the type of overreaching or partiality sufficient to warrant vacatur pursuant to 9 U.S.C. § 10(a). In her May 7, 2021 order denying the SRM Parties' motion to file a counterclaim, the second arbitrator explained her reasoning for refusing to allow the counterclaims, stating that any of those claims could have been brought in the First Arbitration but were not. Again, nothing in the May 7, 2021 order indicates that the second arbitrator exceeded her powers, demonstrated partiality, or exhibited manifest disregard for the law. And again, even if the trial court had disagreed with the second arbitrator's decisions regarding *res judicata*,

[8] Although the FAA is silent respecting the procedure for conducting evidentiary hearings, the TUAA, which is not controlling here but to which the SRM Parties refer interchangeably with the FAA in their brief on appeal, grants discretion to arbitrators in setting hearings: "*If* an arbitrator orders a hearing . . . ." *See* Tenn. Code Ann. § 29-5-316 (c) (emphasis added).

the court was correct to refrain from reversing the Second Arbitration Award. *See Solvay Pharm., Inc*., 442 F.3d at 476.

Finally, the SRM Parties waived any objection to the second arbitrator's rulings on *res judicata* grounds because they did not raise any written objection to her legal or procedural findings during the arbitration process. The AAA Commercial Rules provide:

> Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

AAA Commercial Rules, R-42. It was not until their April 21, 2022 motion to vacate or modify the Second Arbitration Award that the SRM Parties objected in writing to the second arbitrator's rulings on grounds that they were inconsistent, exceeded the arbitrator's powers, or demonstrated partiality or on grounds that the arbitrator had improperly applied the doctrine of *res judicata*. Therefore, even if the SRM Parties' arguments for vacatur had merit, the arguments were waived when they did not raise them during the arbitration proceedings.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's September 16, 2022 order confirming the Second Arbitration Award. We remand this matter to the trial court for collection of costs assessed below. Costs on appeal are assessed to the appellants, the SRM Parties: Suresh Prabhu; SRM Group, Inc.; Andra Insurance Company, Inc.; and St. Simons Insurance Company, Inc.

s/Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE