IN THE SUPREME COURT OF IOWA

NO. 23-0439

PRINCIPAL SECURITIES, INC.,

Plaintiff-Appellee,

vs.

MARK A. GELBMAN,

Defendant-Appellant.

APPLICATION FOR FURTHER REVIEW OF
COURT OF APPEALS DECISION FILED MARCH 27, 2024

ON APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY HONORABLE CELENE GOGERTY

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II. BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

STATEMENT OF FACTS

This application seeks review of a decision issued by the Iowa Court of Appeals on March 27, 2024. (Annex A.) In that decision, the majority affirmed the decision of a District Court decision dated February 7, 2023 (Annex B), which vacated a FINRA arbitration award dated February 23, 2022 (Annex C).

Judge Langholz issued a detailed and persuasive dissent, concluding that the Court of Appeals should instead have vacated the District Court decision and therefore allowed the FINRA arbitration award to remain in force, granting Appellant Mark Gelbman the expungement he had sought and obtained from the fact-finding FINRA arbitration panel. We respectfully file the instant application within the prescribed deadline.

ARGUMENT

1. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DISTRICT COURT'S OPINION

A. The District Court Exceeded the Bounds of its Limited Review of Arbitration Awards under Iowa Code Section 679A.12

The dissent authored by Judge Langholz notes, as a threshold matter, "[f]rom the start of this proceeding to vacate the FINRA arbitration award in his favor, Mark Gelbman has argued that his former employer—Principal Securities, Inc.—asked the court 'to re-try this matter, reach different conclusions regarding the facts and law, and substitute its judgment for that of the arbitrator' and thus exceed its statutory authority." On appeal, Mr. Gelbman "reiterate[d] that the district court erred by accepting that invitation and holding substantial evidence doesn't support the award 'merely because [the court] reached a different conclusion from' the evidence. Gelbman is right." (Annex C, p. 9.)

Judge Langholz's formulation of exactly what went wrong at the District Court and what he disagrees with in the majority opinion is simple, compelling and correct.

As noted in the dissent, Iowa law places "extreme limitations" on judicial review of arbitration awards. *Reicks v. Farmers Commodities Corp.*, 474 N.W.2d 809, 812 (Iowa 1991). (Annex C, p. 9.) This is because "[a] refined quality of justice is not the goal in arbitration"—rather that goal "is

deliberately sacrificed in favor of a sure and speedy resolution . . . without court participation." *Id.* at 811. Put another way, "limited judicial review gives the parties what they bargained for—binding arbitration, not merely arbitration binding if a court agrees with the arbitrator's conclusion." *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 515 (Iowa 1992). (Annex C, pp. 9-10.)

Under Iowa law, an arbitrator "becomes the final judge of the facts and law" and "mistakes of either fact or law are among the contingencies the parties assume when they submit a dispute to arbitration." *Id.* at 516. (Annex C, p. 10.) Here, the district court vacated the award based on the one ground that touches the merits, concluding that "[s]ubstantial evidence on the record as a whole does not support the award." Iowa Code § 679A.12(1)(f). (Annex C, p. 10.)

But even this substantial evidence review is limited. "[E]vidence is substantial if a reasonable person would accept it as sufficient to reach a conclusion." *LCI, Inc. v. Chipman*, 572 N.W.2d 158, 161 (Iowa 1997). Evidence is not "insubstantial merely because different conclusions can be drawn from" it. *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 839 (Iowa 2007). Thus, a court must consider only whether the

evidence supports the award actually made—not whether it could have supported a contrary award. *See id.* (Annex C, p. 10.)

The dissent notes, that "[t]o decide whether substantial evidence supports the award, a court first needs to ask what facts are required to justify the relief granted in the award." (Annex C, p. 11.) Here, Mr. Gelbman pointed not to traditional common law legal theories in seeking expungement, but rather to FINRA rules and guidance, which is expressly permitted by Iowa law. *See* Iowa Code § 679A.12(2) ("The fact that the relief awarded could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."). (Annex C, p. 12.)

The dissent explicates the differing legal theories advanced by the parties in the arbitration and in the district court. It then concludes that "the majority go astray at this first step of the substantial-evidence review. They follow Principal's beckoning to familiar defamation law and our normal modes of de novo interpretation of legal standards. But we don't get to decide whether FINRA requires a statement in its database to be false before an arbitrator could order it changed. Nor do we get to say that a statement is misleading only if made with the heightened intent of being 'calculated to be misunderstood or give a wrong impression,' as the majority does. The

arbitrator could well have accepted Gelbman's interpretation that FINRA permits arbitrators to modify the statements in its database if they are misleading or tend to mislead—by leading the public to an inaccurate impression. And given our limited review, that is the standard we must measure the evidence against." (Annex C, pp. 13-14.)

The dissent then goes on to examine the central question that both the District Court and the majority should have focused on: "Is there substantial evidence that the information originally reported would be misleading to the public?" (Annex C, p. 14.) The dissent summarizes the competing arguments and concludes that "[c]omparing Gelbman's testimony with what Principal originally reported, a reasonable person could easily conclude that the original statements would lead a third party to a mistaken belief about the circumstances of his termination." (Annex C, p. 15.)

The dissent next points out that the "arbitrator found Principal's defense unpersuasive." (Annex C, p. 16.) Judge Langholz acknowledges that "a reasonable arbitrator could have chosen not to believe Gelbman and denied his requested relief. But that's not the question. *See Ales*, 728 N.W.2d at 839. Based on Gelbman's testimony, a reasonable arbitrator *could* conclude that the challenged statements were misleading, as the arbitrator understood that

term, and that the revised statements the arbitrator crafted more accurately reflected the circumstances of Gelbman's termination. Indeed, we must presume that the arbitrator did so here." (Annex C, p. 16.)

Judge Langholz observes that "[t]he district court did not give the award this proper 'reasonable presumption,' even though it acknowledged that Gelbman's testimony supported the award. *Id.* at 841. Instead, it did the opposite—reasoning that the 'lack of a findings in the Award is problematic' and relying on the fact that '[e]ven the Arbitrator made no finding that [Principal's] answers were defamatory in nature or tended to mislead' in support of the court's conclusion the award was not supported by substantial evidence. But absent some contrary requirement in the arbitration agreement or statute, '[a]rbitrators need not disclose the facts or reasons behind their award.' *Reicks*, 474 N.W.2d at 811." (Annex C, p. 16.) The dissent reminds us that "t]he lack of express findings by the arbitrator is irrelevant to the proper substantial-evidence review." (Annex C, p. 17.)

Finally, in discussing whether error was properly preserved and the burden of proof that governs a motion to vacate, Judge Langholz observes, "the arbitration award—not the district court order—is ultimately the decision under review and entitled to every reasonable presumption allowing it to

stand. *Cf. Ales*, 728 N.W.2d at 841. And Principal—not Gelbman—'has the burden of proof to show' the illegality of the award. *First Nat'l Bank v. Clay*, 2 N.W.2d 85, 91 (Iowa 1942). So it would be especially inappropriate to take a 'hypertechnical' approach to error preservation here. *Ezzone v. Riccardi*, 525 N.W.2d 388, 403 (Iowa 1994). I would thus conclude that error is preserved." (Annex C, p. 17.)

Judge Langholz concludes as follows: "Bottom line—substantial evidence supports this binding arbitration award. Principal has not met its heavy burden to vacate it. And so, I would reverse the district court and let the award stand." (Annex C, p. 18.)

We respectfully submit that Judge Langholz's dissent is correct and this Court should adopt its reasoning and analysis in reversing the Court of Appeals, reversing the District Court, and affirming the original arbitration award.

CONCLUSION

Further review should be granted to correct the error of law by the Court of Appeals.

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Defendant-Appellant requests to be heard on oral argument, should this Application be granted.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the Appellant's Brief was $0, because it was filed electronically.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.1103 because:

[x] this application has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 1,421 words excluding the parts of the brief exempted by Iowa R. App. P. 6.1103.

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