IN THE SUPREME COURT OF IOWA

NO. 23-0439

PRINCIPAL SECURITIES, INC,
Petitioner-Appellee,

v.

MARK A. GELBMAN,
Respondent-Appellant.

PETITIONER-APPELLEE'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW (Decision Filed on March 27, 2024)

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY,
No. CVCV063608, THE HONORABLE CELENE GOGERTY

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QUESTIONS PRESENTED FOR REVIEW

Appellant Mark Gelbman failed to identify any specific questions for this Court's review. Appellee Principal Securities, Inc., believes that his application raises the following questions.

1. Should this Court grant further review of an application that identifies no important or substantial issues for this Court to resolve?

2. Has Gelbman preserved any arguments for this Court's review?

3. Did the Court of Appeals correctly affirm the vacatur of the arbitration Award as not supported by substantial evidence under Iowa Code § 679A.12(1)(f) when no evidence established that the statements were either false or misleading?

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STATEMENT RESISTING FURTHER REVIEW

This Court should deny Gelbman's application for further review. "An application for further review will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). This Court has identified a non-exhaustive list of "the character of the reasons" it considers for whether to grant further review. *Id.* Each of those reasons involves an "important" or "substantial" issue. Iowa R. App. P. 6.1103(1)(b)(1)–(4). Gelbman has invoked none of them. He has not even tried to argue that his application otherwise presents such a question that calls for this Court's review. Nor could he. His argument is, as his statement describes it, an assertion that the "Court of Appeals misapplied the relevant standard of review and erred in its analysis of the District Court decision." Gelbman Application at 1. If Gelbman's reasons were sufficient, this Court would routinely grant applications for further review "in normal circumstances." Iowa R. App. P. 6.1103(1)(b). It does not. Gelbman has also waived the arguments he tries to raise in his application and in this appeal. And on the merits, the Court of Appeals was right to affirm the District Court's decision vacating an arbitration award for lack of substantial evidence.

BRIEF RESISTING FURTHER REVIEW

STATEMENT OF THE CASE

Two courts have agreed that the arbitration award that Gelbman obtained lacked substantial evidence. Gelbman had been a registered representative with Principal for almost 10 years, when Principal began an internal review prompted by a customer complaint. D0100, Exh. E-13 (Form U5) at 1, 5 (3/14/2023). That review revealed that Gelbman repeatedly failed to obtain and document approval from his customers for each sale or purchase of a security the same day. D0080, Exh. D (Tr. Arbitration Hrg.) at 110:10–14 (3/14/2023); D0097, Exh. E-10 (Emails) (3/14/2023). This failure violated Principal's policies. D0114, Exh. F-11 (Principal, Section 5.G) at 1 (3/14/2023). Principal, accordingly, terminated Gelbman's association with it. D0100, Exh. E-13 (Form U5) at 1 (3/14/2023).

Principal described that termination in the form required by the Financial Industry Regulatory Authority ("FINRA") rules. In that form, Principal stated that it had discharged Gelbman for failing to adhere to its policies and that Gelbman had been under internal review when Principal terminated him. D0100, Exh. E-13 (Form U5) (3/14/2023); *see also* D0119, Exh. F-16 (FINRA Regulatory Notice 10-39) at 2 (3/14/2023).

Gelbman sought expungement of those statements as defamatory. D0078, Exh. B (Gelbman's Statement of Claim) (3/14/2023). But he presented no evidence

that they were false in the arbitration hearing. *Cf.* D0080, Exh. D (Tr. Arbitration Hrg.) at 48–49 (3/14/2023). In fact, he testified that Principal's statements in that form "were not technically untrue." *Id.* at 56:2; *see also id.* at 105:4–24. Nevertheless, the arbitrator ordered Principal to revise its explanation of Gelbman's termination and change other answers on the form, including changing the form to provide that he was *not* under investigation at the time of termination. Annex C at 2.

Principal then filed this action to vacate the award in the District Court, including under Section 679A.12(1)(f) because the award lacked substantial evidence. D0001, Principal Securities, Inc.'s Mt. to Vacate or in the Alternative to Modify Arbitration Award (5/5/2022); D0018, Principal Securities, Inc.'s Mt. to Vacate or in the Alternative to Modify Arbitration Award (8/3/2022). Gelbman never argued that substantial evidence supported that award. D0066, Gelbman's Corrected Br. Opposing Request for Facatur of Arbitration Award at 9–12 (10/6/2022); D0126, Tr. of 12/9/2022 Hrg. at 21–22 (filed 3/17/2023). The District Court ultimately ruled that the award lacked substantial evidence and vacated it. Annex B. The "overwhelming majority of the evidence on record," it concluded, "supports that [Principal] was entirely truthful in its statements, documentation, and explanation," so that the changes awarded by the arbitrator "would actually render [Principal's] answers untruthful." Annex B at 12.

The Court of Appeals affirmed in a divided opinion. Annex A.

ARGUMENT

This Court can easily deny Gelbman's application for further review. Gelbman identifies no significant or important reason for this Court to review his appeal. He has, moreover, waived the arguments that he now asks this Court to review. But even if this Court were to reach the merits, Gelbman's arguments would not fare much better. The Court of Appeals and the District Court got it right. The District Court correctly found that substantial evidence did not support Gelbman's contention before the arbitrator that Principal's report of the circumstances of his termination was inaccurate when all the evidence, including Gelbman's own testimony established that that report was, in fact, true.

1. Gelbman has failed to identify any extraordinary circumstances that warrant further review by this Court

Nothing in Gelbman's application establishes that any extraordinary circumstances are present that would warrant further review by this Court. This Court "will not" grant an application for further review "in normal circumstances." Iowa R. App. P. 6.1103(1)(b). It, instead, ordinarily exercises its discretion to grant further review for cases where there is an "important" issue that calls for this Court's review. Iowa R. App. P. 6.1103(1)(b)(1)–(4). Gelbman has not even attempted to argue that his application presents such a question. The Court of Appeals affirmed the District Court's ruling that an arbitration award lacked substantial evidence. All evidence before the arbitrator, it concluded, established that Principal's statements

in the form were true and not misleading. Annex B at 7–8. This fact-bound analysis should not give rise to the kind of broader issues that call for further review by this Court.

Gelbman has, moreover, identified no specific questions presented for review in his application. *See* Iowa R. App. P. 6.1103(1)(c)(1). He identified no "specific issue of importance and any purported prior conflicting authority" in his statement. Iowa R. App. P.6.1103(1)(c)(3). He identified no reasons why his application presents an important or significant question that takes it out of the "normal circumstances" in which this Court denies an application for further review. Iowa R. App. P. 6.1103(1)(b); *see also* Iowa R. App. P. 6.1103(1)(c)(3).

2. Gelbman has waived the arguments he now raises in his brief

Gelbman's shifting theories at each stage of this litigation precludes a ruling in his favor on the merits. "Error preservation is a fundamental principle of law with roots that extend to the basic constitutional function of appellate courts." *State v. Harrington*, 893 N.W.2d 36, 42 (Iowa 2017), *as amended* (2017). "Generally, [this Court] will only review an issue raised on appeal if it was first presented to and ruled on by the district court." *Ronnfeldt v. Shelby Cnty. Chris A. Myrtue Mem'l Hosp.*, 984 N.W.2d 418, 421 (Iowa 2023) (quoting *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008)). Although this rule should not be treated as "hypertechnical," *Ezzone v. Riccardi*, 525 N.W.2d 388, 403 (Iowa 1994), *as amended on denial of reh'g*

(1994), an objection must be "sufficiently definite to preserve error." *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 825 (Iowa 1994) (quoting *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 116 (Iowa 1989)). A party must also "properly present the issue on appeal." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 67 (2006)

Gelbman waived his arguments at least three times. The argument that he made to the Court of Appeals he never made to the District Court. Even in his appellate brief, he failed to include record citations to support that argument. And the argument he now makes in his application for rehearing he never made in his appellate brief. Each of these waivers, alone, is reason to deny further review.

First, Gelbman failed to preserve the substantial-evidence argument he made to the Court of Appeals. Gelbman's appellate brief argued that the District Court committed an error of law and exceeded its powers in vacating the award because (1) the District Court grounded its opinion in the lack of findings in the Award; (2) the District Court was required to accept the arbitrator's assertion and the District Court could not second guess his conclusions; and (3) there was substantial evidence to support the arbitration award in the form of Gelbman's own testimony. Appellant's Brief at 16–19. He, however, raised none of these arguments in the District Court. *See* D0066, Gelbman's Corrected Br. Opposing Request for Facatur

of Arbitration Award at 9–12 (10/6/2022); D0126, Tr. of 12/9/2022 Hrg. at 21–22 (filed 3/17/2023). The only arguments raised by Gelbman regarding Iowa Code § 679A.12(1)(f) was that it did not apply because it was preempted by the Federal Arbitration Act and that it was improper to ask the District Court to retry the matter. *See* D0066, Gelbman's Corrected Br. Opposing Request for Facatur of Arbitration Award at 9–12 (10/6/2022); D0126, Tr. of 12/9/2022 Hrg. at 21–22 (filed 3/17/2023). The Court of Appeals "agree[d] Gelbman never argued below the award was supported by substantial evidence and instead claimed that federal law preempted the Iowa arbitration statute (a claim he has abandoned on appeal)," although it did not "decid[e]" if "error was preserved for purposes of this appeal" before ruling against him on the merits. Annex A at 5. Gelbman even admitted as much in his reply. Gelbman Reply 13. Gelbman failed to preserve his argument that the award was supported by substantial evidence in the trial court. *See Grefe*, 525 N.W.2d at 825 (ruling that an appellant failed to preserve error when "she d[id] not make the same argument" on appeal as she did in the trial court).

Second, Gelbman failed to cite any portion of the record that supported his substantial-evidence argument in the Court of Appeals. In his appellate brief, he failed to satisfy the requirement of Rule 6.903 that he include "references to the

pertinent parts of the record" in his argument. Iowa R. App. P. 6.903(2)(a)(8)(3).[1] Gelbman's argument is devoid of any relevant facts. He, for instance, insisted—without elaboration—that his own testimony "supports the finding made by the Arbitrator." Appellant's Brief at 19. Yet, he never mentions the substance of his testimony. *See generally* Appellant's Br.; Gelbman Application. And he never explains how that testimony could have provided substantial evidence that Principal's statements in the form were not true.

Third, Gelbman's argument in his application for further review is absent from his brief to the Court of Appeals. In that brief, he argued that the District Court's ruling rested on the absence of findings in the award, the District Court could not second guess the arbitrator, and that the award was supported by substantial evidence. Appellant's Br. 16–19. He argued only that the District Court was wrong about the strength of the evidence before the arbitrator, not that it was wrong about what defamatory or misleading meant. *Id.* But in his application, he seems to adopt an argument that the dissent proposed in the Court of Appeals that the District Court was wrong about what defamatory or misleading meant. *See* Gelbman's Application 4–6. The dissent should not have addressed these questions because they were "raised or briefed by the parties," *City of Davenport v. Seymour*, 755 N.W.2d 533,

[1] When the parties filed their appellate briefs, this rule was numbered Iowa R. App. P. 6.903(2)(g)(3). It is now numbered Iowa R. App. P. 6.903(2)(a)(8)(3).

545 (Iowa 2008), and Gelbman cannot try to raise them now after failing to brief them to the Court of Appeals. This Court should reject his attempt to raise new arguments at each level of the appeal process.

3. Even if Gelbman had not waived his arguments, this Court should affirm the ruling of the Court of Appeals and the District Court in favor of Principal

Even if Gelbman had preserved his arguments for this Court's review, the decision of the Court of Appeals should stand. The Court of Appeals correctly ruled that the District Court did not commit an error of law when it found the arbitration award was not supported by "[s]ubstantial evidence on the record as a whole" and vacated the arbitration award pursuant to Iowa Code § 679A.12(1)(f). Gelbman's argument would gut this provision of the statute and require a district court to defer completely to an arbitrator without considering whether there was substantial evidence before the arbitrator to support the award.

The District Court order vacated the arbitration award pursuant to Iowa Code § 679A.12(1)(f) on the ground that the award was not supported by substantial evidence. *See* Annex B at 12. Gelbman had contended that the "District Court erred as a matter of law because the Arbitrator's Award did not lack support by substantial evidence on the record as a whole." Appellant's Brief at 16. However, Gelbman appeared to confuse a finding of fact by the District Court with its application of the law. Thus, Gelbman suggested that the Court of Appeals apply the wrong standard

of review. The applicable standard of review is for errors at law. The District Court's Order makes clear that it did not commit any errors of law; instead, the District Court correctly identified the applicable law including the correct standard of review and the limited grounds pursuant to which it could consider vacatur. After applying the law correctly, the District Court made a factual finding that there was not substantial evidence to support the Award. The Court of Appeals was bound by the District Court's finding of fact so long as it is "supported by substantial evidence." *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002). Evidence is substantial if "a reasonable mind would accept it as adequate to reach a conclusion." *Id*. (citation omitted). The appellate court "will not reweigh the evidence." *Id*. at 785. The District Court's factual determination that the Award was not supported by substantial evidence was itself supported by substantial evidence such that it cannot be overturned. For all of these reasons, and those discussed in detail below, the Court of Appeals correctly affirmed the District Court.

A. The District Court correctly identified the law applicable to the motion to vacate.

The District Court carefully and thoughtfully identified the law that it applied and followed, all of which was appropriate under the current state of the law in Iowa. In fact, Gelbman failed to point to a specific error of law by the Court, which alone should be fatal to his claim. *See* Iowa R. App. P. 6.903(2)(a)(8)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *Kachevas,*

Inc. v. State, 524 N.W.2d 450, 452 (Iowa Ct. App. 1994) (deeming two "claims as waived since no authority to support the issues was stated, argued, or cited"). Nowhere in his brief does Gelbman identify a case that the District Court should not have relied on or that the District Court misapplied. The standard of review cited by the District Court, *see* Annex B at 3–4, is identical to the standard that Gelbman suggests should have been followed, *see* Appellant's Brief at 14–16.

The District Court correctly noted "'judicial review of arbitration awards is very limited in Iowa.'" Annex B at 3 (quoting *Humphreys v. Joe Johnston L. Firm, P.C.*, 491 N.W.2d 513, 514 (Iowa 1992)). The District Court also appropriately noted that it could not "vacate or refuse to confirm the award even if the court could not or would not grant the same relief," that it was not the District Court's function "to determine whether the arbitrator has correctly resolved the grievance," and that "even a court's conviction that the arbitrator committed error does not suffice to overturn the decision." Annex B at 4 (quoting Iowa Code § 679A.12(2); *Postville Cmty. Sch. Dist. v. Billmeyer*, 548 N.W.2d 558, 562 (Iowa 1996); *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 841 (Iowa 2007)). The District Court's stated standard of review was identical to that espoused by Gelbman and cites many of the same cases. *Compare* Appellant's Brief at 14–15 *with* Annex B at 3–4. Thus, the standard of review applied by the District Court was not error.

The District Court further correctly identified that the only grounds for vacatur that it could consider were those embodied in Iowa Code § 679A.12(1). *See* Annex B at 4. Gelbman unequivocally agrees that the standard identified by the District Court is the correct standard: "Iowa Code section 679A.12 describes the only grounds upon which an arbitration award can be vacated and is the governing statue here." Appellant's Brief at 16. Thus, the grounds relied upon by the District Court for vacatur was not error.

Finally, the District Court identified the correct legal standards applicable to a motion to vacate an arbitration award because the award was not supported by substantial evidence under Iowa Code § 679A.12(1)(f). Specifically, the Court noted, "evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion" and that the District Court could "not consider evidence to be insubstantial merely because different conclusions can be drawn from the evidence." Annex B at 6 (quoting *Ales*, 728 N.W.2d at 839; *State v. Dohlman*, 725 N.W.2d 428, 430 (Iowa 2006)).

Thus, the law identified by the District Court was correct and it committed no error in this regard.

B. The District Court correctly applied the law.

Not only did the District Court cite the correct legal standards for its analysis, its application of those standards was also correct. Gelbman argued that the District

Court committed error in three ways: (1) because its decision was based on the Arbitrator not making findings in the award; (2) because the District Court was required to accept and could not second guess the Arbitrator; and (3) because there was substantial evidence in the record to support the award. Appellate Brief 16–20. Gelbman's arguments are incorrect for the reasons discussed in detail below.

Gelbman first argued that District Court erred because "it grounded its decision on its view that the Arbitrator made no findings in the Award for the Court to review." Appellant's Brief at 17. Gelbman's premise is false. The District Court's decision was not based on the fact that there were no findings in the Award, but instead simply described the award. *See* Annex B at 6. The District Court specifically noted that because there were no findings to review, the District Court then "examine[d] the evidence to determine if the evidence supports each aspect of the Award." *Id*. Gelbman does nothing to explain why the process followed by the District Court was improper and he cannot do so. Gelbman's first argument failed. *See* Annex A at 6–7 (noting that absence of factual findings did not "preclude" the review of the Court of Appeals).

Gelbman next argued that the "District Court erred as a matter of law and exceeded its power by determining that the portion of the Award recommending replacement explanation language was not supported by substantial evidence." Appellant's Br. at 18. In support of this proposition, Gelbman argues that the

"District Court was required to accept the Arbitrator's assertion that he reached his decision after reviewing 'the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions'" and that "[i]t was beyond the District Court's purview to question the Arbitrator's statement and to second-guess his conclusions." Appellant's Br. at 18–19 (citation omitted). Gelbman utterly failed to cite a single case or statute in support of these two propositions. Gelbman does not cite any supporting authority because he cannot. Moreover, such a suggestion is nonsensical.

This Court and the legislature have commanded that an arbitration "award *must* be vacated if not supported by substantial evidence." *Humphreys*, 491 N.W.2d at 516 (emphasis added). "Generally, evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion." *Id.* (citing *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990)). The District Court's review thus necessarily requires a review of the evidence in the arbitration to determine if the award is supported by substantial evidence. *See id.* at 515–16 (stating that Iowa Code § 679A.12(1)(f) has modified the scope of review of arbitration in Iowa and requires the District Court to review the evidence to determine whether it is substantial). The District Court did not err in reviewing the evidence in the arbitration to determine whether it was substantial. If Gelbman takes issue with the District Court's finding that the evidence was insubstantial he must "show on appeal that the District Court

erred in its *finding* of [in]substantial evidence." *Id*. at 516 (emphasis added). Gelbman has not done so, and this argument likewise fails.

Gelbman's third and final argument was that the "District Court erred as a matter of law and exceeded its power by determining that the Award was not supported by substantial evidence in its finding that the Form U5 filings were neither defamatory nor misleading." Appellant's Br. at 19. Gelbman argues that the District Court's determination was wrong for two reasons: (1) because the Award identifies that it was made after the Arbitrator considered the pleadings, testimony, and evidence at the hearing; and (2) because there was evidence in the record—Gelbman's own testimony—to support the decision. Appellant's Br. at 19–20.

Gelbman's first point, like many of his other points, was unsupported by any authority supporting his contention. Moreover, it is irrelevant: the District Court did not dispute that the Arbitrator considered his Award to be based on the pleadings, evidence, and testimony before him. *See generally* Annex B. That does not change the fact that the District Court was required to review the evidence and determine whether substantial evidence supported the Award. The District Court simply noted that, without findings or reasoning from the Arbitrator, the Court's review is made more challenging, but did not say that was its basis for vacating the award. *See* Annex B at 8.

Gelbman's second point asserted that the District Court's decision was wrong because there was evidence in the record to support the Arbitrator's decision. However, the question before the District Court was not whether there was *any* evidence in the record that could support the Award, but whether there was *substantial* evidence "on the record as a whole" to support the award. Iowa Code § 679A.12(1)(f). As noted above, "evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion." *Humphreys*, 491 N.W.2d at 516. The District Court provided great detail in the different evidence it reviewed and how it reached its determination that, while Gelbman provided testimony to support his position (and thus the award), his testimony was the *only* evidence in the record supporting the Award and was in fact contradicted by the majority of other evidence in the record, "including his how testimony." *See* Annex B at 8–11. Thus, the District Court found—not that the evidence was nonexistent—but that it was not substantial. The District Court's finding in this regard is given great deference and is binding on this Court so long as it is supported by substantial evidence. *See Iowa Fuel & Minerals, Inc.*, 471 N.W.2d 859, 862 (Iowa 1991). Gelbman has not met his burden to show that the District Court's factual finding in this regard should not be followed. He has not even argued that the District Court's determination was not supported by substantial evidence. Finally, the testimony was not substantial evidence because it did not prove that the statements were untrue.

Instead, his testimony demonstrated that he violated the policy because he did not obtain approval from the customers prior to the closing transactions, which was in violation of Principal's policy. *See* Annex B at 9.

Thus, Gelbman has failed to meet his burden to demonstrate that the District Court committed an error of law in determining to vacate the arbitration Award.

CONCLUSION

This Court should deny the application for further review.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this brief was electronically filed and served on April 26, 2024, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS

This resistance complies with the typeface requirements and type-volume limitations of Iowa R. App. P. 6.1103(4) because:

1. This resistance has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 4,090 words excluding the parts of the resistance exempted by Iowa R. App. P. 6.1103(5)(a). (Microsoft Word counted 98 for the questions presented for review and 3,992 for the rest of the non-exemption parts of the resistance.)

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