

# Supreme Court of New Jersey

Docket No. 088645

LAURENCE J. RAPPAPORT et al.,	: CIVIL ACTION
	:
	: ON PETITION FOR CERTIFICA-
	: TION FROM FINAL JUDGMENT
<i>Plaintiffs-Respondents,</i>	: OF THE SUPERIOR COURT OF
	: NEW JERSEY, APPELLATE DIVI-
	: SION
	:
— VS. —	: DOCKET NOS.: A-000491-21
	: A-000492-21
	:
	: Sat Below:
KENNETH PASTERNAK et al.,	: HON. RICHARD J. GEIGER, J.A.D.
	: HON. RONALD SUSSWEIN, J.A.D.
	: HON. MARITZAB. BYRNE, J.A.D.
<i>Defendants-Appellants.</i>	:
	:
	:
	:

## AMICUS CURIAE BRIEF

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THE *AMICUS CURIAE* PARTY

The Committee for Dispute Resolution is an association of arbitrators, lawyers and academics who are active in arbitration in the ADR (Alternative Dispute Resolution) and CDR (Complementary Dispute Resolution) communities of New Jersey. The Committee has a particular interest in and experience with private arbitration.

The Committee is interested in the vitality of arbitration in New Jersey, which requires limited, predictable, and consistent standards for confirming or vacating arbitral awards. The Committee intends to highlight the universally accepted distinction between the plenary review of court cases and the statutorily limited scope of review afforded the judiciary over arbitral awards, as well as the arbitrator's authority to determine her own jurisdiction under the Rules of the American Arbitration Association that were selected by the parties to govern this matter. In examining the arbitral award in this matter, the Appellate Division appears to have exceeded the limitations placed on its review both by the parties' agreement and applicable law.



## LEGAL ARGUMENT

### POINT ONE

#### **AMICUS CURIAE STATUS IS APPROPRIATE FOR THE COMMITTEE FOR DISPUTE RESOLUTION IF THE PETITION IS GRANTED**

This matter has “broad implications” for the administration of justice and the field of arbitration. *Keenan v. Bd. Of Chosen Freeholders*, 106 N.J. Super. 312 (App.Div.1969). It is of “general public interest”, *Case v. Male*, 63 N.J. Super. 255, 259 (Law Div.1960); and is ripe for the grant of *amicus curiae* status because the ruling below threatens central recognized features of arbitration, including finality and expedition as well as the parties’ contractual election to proceed to resolve their dispute in a non-judicial form. Furthermore, participation of the Committee “...will assist in the resolution of an issue of public importance, and no party to the litigation will be underly prejudiced thereby.” *Rule* 1:30-9.

Although the role of *Amicus Curiae* is traditionally advisory rather than adverse, *Case*, 63 N.J. Super. at 258, courts now permit *Amici Curiae* to be partial, *Neonatology Assocs. P.A. v. Comm’n of Internal Revenue*, 293 F.3d 129 (3d Cir. 2002). Further, there is “. . . a liberal standard for permitting *amicus* appearances.” *Pfizer, Inc. v. Dir., Div. of Taxation*, 23 N.J. Tax 421, 424 (2007).

The growth and importance of arbitration as a dispute resolution mechanism was originally greeted by hostility in the courts. However, modern arbitration statutes and court rulings dictate treating arbitration agreements as other contracts to avoid disfavoring arbitration:

The FAA reflects the fundamental principle that arbitration is a matter of contract. Section 2, the “primary substantive provision of the Act,” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), provides:

“A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.”

The FAA thereby places arbitration agreements on an equal footing with other contracts...

[*Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)]

New Jersey law tracks the Federal statutes in this regard.

## POINT TWO

THE PETITION FOR CERTIFICATION  
SHOULD BE GRANTED IN ORDER TO  
CLARIFY THE PROCEDURE FOR MODI-  
FICATION OR VACATUR OF AN ARBI-  
TRATION AWARD

In the last century, arbitration has become an important adjunct to the public court system, permitting parties to elect a lower cost and speedier method

for resolving disputes that does not have all elements of the judicial process. The sheer volume of arbitrated disputes, especially during the pandemic, has served to relieve an inordinate burden on the court system

One of the key features of arbitration is the limited scope of review of arbitral awards. The rules of evidence do not apply in arbitration (unless the parties agree otherwise), the rules of civil procedure, including discovery rules, do not apply, no transcript is mandated, and the arbitrator may issue a simple award without stating reasons.

The resulting award may be vacated only on limited statutory bases. 9 U.S. Code §§10 *and* 11; N.J.S.A. 2A: 23B-23 *and* 24. This fosters finality and the promise of early enforcement. By straying beyond the limited role for review and vacation of arbitral awards provided by these statutes and case law, the decision below threatens to undermine the foundational assumptions that cause parties to select private dispute resolution.

In addition, under the facts of this case, the court below ignored the fact that the parties here specifically elected to have the arbitrator, not the courts, determine what issues were before him and to resolve the scope of his own authority to address those issues. Here, the arbitrator did so by determining that the claim for carried interest had been properly raised before him and that the evidence proffered was insufficient to support the claim.



Respecting the contractual nature of arbitration, this Court in *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.*, 135 N.J. 349, 357-8 (1994) and the U.S. Supreme Court in *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 79, 130 S. Ct. 2772, 2783, 177 L. Ed. 2d 403 (2010) have specifically held that the parties may limit the scope of judicial authority by delegating to the arbitrator the authority to determine the scope of the dispute and the arbitrator's own jurisdiction to hear and resolve that issue.

Here, the parties' agreement specified that the American Arbitration Association (AAA) Commercial Rules applied. Those Rules have been specifically held to constitute clear and unmistakable delegation to the arbitrator of the issue of his own jurisdiction:

We start with who decides, as the Defendants argue that the incorporation of the AAA Rules in Silva's arbitration clause constitutes clear and unmistakable evidence that the parties agreed to delegate arbitrability. We agree. Silva's agreement provides that "all controversies, disputes or claims between Coverall ... and Franchisee ... shall be submitted promptly for arbitration" and that "[a]rbitration shall be subject to ... the then current Rules of the American Arbitration Association for Commercial Arbitration." (App. at 94.) Clearly and unmistakably then, the AAA Rules govern the arbitration of any dispute between Silva and Sujol. And Rule 7(a) of the AAA Rules states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American



Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule 7(a).

[*Richardson v. Coverall N. Am., Inc.*, 811 F. App'x. 100, 103 (3d Cir. 2020)]

In light of the fact that the arbitrator had the obligation to determine which issues were raised before him and to resolve those issues, review should have been limited to the statutory search for fundamental wrongdoing or fraud in the proceeding (see supra citation to the state and federal modification and vacatur statutes). The steady application of long-established rules fosters the promise of speed, efficiency, and finality that parties believe they are choosing when they contract to arbitrate.

The arbitrator, an experienced lawyer and former judicial official, left no doubt on the remand that he had considered the carried interest issue and found, after a careful review and consideration of the record, that it had not been proven. The trial court properly confirmed the award. The award was entitled to deference and no statutory basis for vacatur was relied upon in the Appellate Division Opinion. The review of the scope of the claims presented to the arbitrator was improper in this case because that very issue was for the arbitrator to decide. The trial court properly confirmed the award based on the record as presented.

When the Appellate Division directed a de novo review of the record, they essentially acted in place of the arbitrator by weighing witness testimony. In other words, they acted as an appellate court on a de novo review of a judicial proceeding. It is apparent that they gave no deference to the arbitrator's findings. In short, by expanding the scope of judicial review and rejecting the arbitrator's award, they impermissibly reversed the trial court's confirmation of the award.

Although the opinion that the Appellate Division rendered below is not precedential in the sense that it is not a reported case, in today's day and age, all opinions are available to lawyers and the public. Where an appellate court, in particular, reverses an arbitrator's award, note is taken of it, particularly whether as in this case, the financial stakes appear to be extremely high.

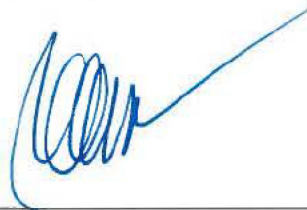
### **CONCLUSION**

This Court should accept the above case for certification because it presents an issue of significant public interest and importance that will impact the administration of justice in New Jersey and impair the vitality of arbitration in this state.

For the foregoing reasons the Committee for Dispute Resolution, requests that, pursuant to *Rule* 1:30-9, this Court grant the Petition for Certification.

Respectfully submitted,

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