IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0604

M.K. WEEDEN CONSTRUCTION, INC.,

Applicant and Appellee,

v.

SIMBECK AND ASSOCIATES, INC.,

Respondent and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County, Cause No. DV-21-204C, the Honorable John Brown Presiding

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Appellant, Simbeck and Associates, Inc. ("Simbeck"), submits this Opening Brief requesting that the Montana Supreme Court reverse the Order of the District Court vacating the arbitration award entered *In the Matter of the Arbitration Between Simbeck and Associates, Inc. v. M.K. Weeden Construction, Inc.*

STATEMENT OF THE ISSUES

1. Did the District Court err by vacating the Awards based on a finding that the Arbitrator manifestly disregarded Montana law concerning whether a contractual breach is material?

2. Does Montana law recognize vacating an arbitration award based upon a finding that an arbitrator exceeds his power under § 27-5-312(1)(c), Mont. Code Ann., when he issues an award that is not in proper form?

3. If the answer to Issue No. 2 is yes, did the District Court err by vacating the Award under § 27-5-312(1)(c), Mont. Code Ann., based on a finding that the Arbitrator's Awards were not in proper form and did not constitute "reasoned awards"?

4. Is Simbeck entitled to an award of attorneys' fees in the District Court proceeding and on appeal?

STATEMENT OF THE CASE

Simbeck's appeal arises from the District Court vacating an arbitration award that was issued following a nearly year-long binding arbitration proceeding

culminating in a five-day hearing. The arbitration was administered through the American Arbitration Association (the "AAA") before arbitrator Robert F. Babcock, Esq. (the "Arbitrator").

The Arbitrator's Interim Award was entered on November 24, 2020, and the Arbitrator's Final Award was entered on February 17, 2021 (collectively, the "Awards"). Appendices B and C. Simbeck was the prevailing party in the arbitration.

On February 26, 2021, M.K. Weeden Construction, Inc. ("MKW") filed an Application to Vacate the Awards in the Eighteenth Judicial District Court. C.R.R. 2. On March 16, 2021, Simbeck filed its Response in Opposition and a Cross Motion to Confirm Arbitration Award. C.R.R. 4. The parties' cross motions were fully briefed. C.R.R. 11 and 15.

On May 20, 2021, Simbeck filed its proposed Findings of Fact and Conclusions of Law ("FOFCOL") pursuant to the local rules. C.R.R. 18. A hearing was held before Hon. John C. Brown on May 24, 2021.

On June 14, 2021, MKW filed its proposed FOFCOL, C.R.R. 24, and Simbeck filed its First Amended Proposed FOFCOL. C.R.R. 23. Simbeck also filed a Sur Reply Brief addressing Simbeck's amendments to its original FOFCOL. C.R.R. 21.

On November 29, 2021, the District Court filed its Order vacating the Awards. Appendix A. The Order adopted MKW's FOFCOL in its entirety without revisions.[1] *See* Appendix A and C.R.R. 24 *cf.* Appendix H.

On November 30, 2021, Simbeck filed its Notice of Appeal of the Order vacating the Awards.

STATEMENT OF THE FACTS

I. Facts of the Underlying Dispute.

This is a case about a family-owned company, Simbeck, that was taken advantage of by MKW.

The dispute in the underlying arbitration proceeding relates to a project on the Sibanye Stillwater Mine. Stillwater Mine hired MKW as the general contractor for a project entitled the Stage 4 TSF Embankment Raise (the "Project"). Under its contract with Stillwater Mine, MKW agreed to raise the tailing storage facility embankment and to install a geosynthetic lining system.

MKW, as the general contractor, hired Simbeck as a subcontractor and the parties executed a subcontract dated October 14, 2019 (the "Subcontract"). Under the Subcontract, Simbeck had the right to install all the lining necessary for the

[1] The District Court only changed the font and removed one set of forward slashes ("//") from page 16 of MKW's proposed order. *See* Appendix A, p. 13 and Appendix H, p. 16.

Project, which was anticipated to be approximately 51,200 yards of lining. Appendix D, § 1. The pricing under the Subcontract was unit pricing. *Id.*, § 4.

Despite MKW's contractual obligations to Simbeck, MKW hired a second lining contractor, H2J Installers ("H2J"). Appendix B, ¶ 9. MKW did not inform or discuss with Simbeck H2J's hiring. *Id.* MKW hired H2J to perform Simbeck's scope of work under the Subcontract. *Id.*, ¶ 19.

Although MKW hired H2J to replace Simbeck, the two witnesses presented by MKW at the arbitration proceeding both testified that, while MKW was concerned about the speed of Simbeck's work, the performance of Simbeck did not justify terminating Simbeck for default.[2] *Id.*, ¶ 10. MKW's project superintendent testified at the arbitration hearing that its goal was to have Simbeck and H2J "race" to perform the same scope of work.[3] The Arbitrator determined that MKW materially breached the Subcontract by hiring H2J to perform a material portion of Simbeck's scope of work under the Subcontract and that MKW breached the covenant of good faith and fair dealing. *Id.*, ¶¶ 19, 23.

[2] It was contemplated during the bidding phase that the lining work would be installed in the late summer or early fall. However, the Project was repeatedly delayed requiring the work to be performed in the winter. The Arbitrator found that these delays were not attributable to Simbeck. Appendix B, ¶¶ 4-6.

[3] Because of unit pricing, Simbeck faced losing a substantial portion of the sum it was entitled to under the Subcontract.

Following MKW's material breach, the Arbitrator determined that it was reasonable for Simbeck to believe that it was being replaced by H2J on the Project. *Id.*, ¶ 30. In response, Simbeck removed its workers and equipment from the site. The Arbitrator determined that it was reasonable for Simbeck to believe that MKW could, and likely would, refuse to allow Simbeck to remove its equipment from the site. *Id.*, ¶ 30. Simbeck repeatedly stated that it was willing to return to the Project, but that MKW needed to address past-due payments owed to Simbeck. *Id.*, ¶ 32. MKW refused to discuss Simbeck's demands and terminated the Subcontract with Simbeck. *Id.*, ¶ 37.

II. Facts of the Arbitration Proceedings.

Simbeck submitted its dispute with MKW to the AAA because MKW included a binding arbitration clause in its form subcontract. The Subcontract required the parties to submit all disputes to binding arbitration pursuant to the procedures set forth in the Construction Industry Guidelines of the AAA. Appendix D, § 22. The Subcontract also required the parties submit all disputes to mediation. *Id.*, § 24(q).

Following MKW's termination of the Subcontract, Simbeck requested mediation pursuant to the Subcontract. C.R.R. 4, Ex. 2. MKW refused to participate in mediation. *Id.*, Ex. 3.

On January 14, 2020, Simbeck submitted a Demand for Arbitration to the AAA. *Id.*, Ex. 5. On January 24, 2020, MKW filed its Answer and Counterclaim. *Id.*, Ex. 7.

On February 24, 2020, Simbeck filed its First Amended Demand for Arbitration. *Id.*, Ex. 9. Simbeck's claims in its First Amended Demand included: (i) breach of contract, (ii) negligence, (iii) negligent misrepresentation, and (iv) constructive fraud. *Id.*, Ex. 9.

On March 2, 2020, the AAA sent a Notice of Appointment letter acknowledging that the parties had agreed to the appointment of Robert F. Babcock, Esq. *Id.*, Ex. 11. The parties also received the disclosure required under § 27-5-116, Mont. Code Ann. C.R.R. 4, Ex. 13.

On March 31, 2020, a preliminary hearing was held before the Arbitrator. At the preliminary hearing, Simbeck and MKW agreed that the form of the award would be a "reasoned award". This agreement is reflected in the April 3, 2020 Scheduling Order:

> **Form of Award:** The Arbitrator shall issue a *Reasoned Award* at the conclusion of these proceedings.

Appendix E, p. 3. The agreement between MKW and Simbeck was never changed.

On April 8, 2020, MKW filed its Counterclaim, and a Reply by Simbeck followed. C.R.R. 4, Exs. 11 and 19. On May 12, 2020, MKW filed an Amended Counterclaim followed by Simbeck's Reply. *Id.*, Exs. 20 and 21.

On September 25, 2020, Simbeck filed its Pre-Hearing Brief. Appendix G. The claims of Simbeck set forth in its Pre-Hearing Brief were: (i) breach of contract, (ii) breach of the implied duty of good faith and fair dealing, (iii) negligence, (iv) negligent misrepresentation, and (v) constructive fraud. *Id.*, pp. 38-45. Simbeck also sought punitive damages in connection with its negligence, negligent misrepresentation, and constructive fraud claims, alleging that MKW acted with malice and the intent to harm Simbeck for its own economic benefit. *Id.*, p. 46.

On September 25, 2020, MKW also filed its Pre-Hearing Brief alleging claims for breach of contract and the implied duty of good faith and fair dealing. C.R.R. 4, Ex. 23.

The parties presented evidence and arguments in the arbitration hearing from October 5 through October 9, 2020. Appendix B, p. 1. At the arbitration hearing: (i) Simbeck and MKW's counsel were present, and (ii) both parties presented testimony, evidence, and exhibits. *Id.* At the conclusion of the hearing, the parties agreed that the Arbitrator had authority to award attorneys' fees and costs to the prevailing party. *Id.*, ¶ 71. Both parties submitted post-hearing briefs following the conclusion of the hearing. *Id.*, p. 1.

On November 24, 2020, the Arbitrator issued a fifteen-page Interim Award. *Id.* In the Interim Award, the Arbitrator determined that MKW materially breached the Subcontract by hiring H2J to perform a material portion of the scope of the

Subcontract and that MKW breached the covenant of good faith and fair dealing. *Id.*, ¶¶ 19, 23. The Arbitrator also found that, because MKW materially breached the Subcontract by hiring H2J, MKW was not entitled to recover damages against Simbeck. *Id.*, ¶ 59.

The Arbitrator determined that Simbeck was entitled to the following damages:

I. $274,020.92 with interest awarded on that sum at the rate of 1.5% per month from January 14, 2020 for: (i) unpaid sums for the work performed on the Project, (ii) the unpaid balance of the markup on the materials provided, (iii) materials that were delivered by Simbeck but not used, (iv) the bond costs, and (v) reasonable lost profits.

II. $41,262.00 for reasonably foreseeable consequential damages arising out of the lost profit on future jobs.

III. $22,148.48 for fees and costs incurred by Simbeck's bonding company.

IV. Total Interim Award: $337,431.40.

Appendix B.

The Interim Award concluded with a determination that the parties agreed that the Arbitrator was empowered to award attorneys' fees and costs to the prevailing party, and that Simbeck was the prevailing party. *Id.*, ¶¶ 70-72. The Interim Award reserved the question of attorneys' fees and costs for the Final Award. *Id.*

On December 2, 2020, MKW filed a Motion to Reconsider. C.R.R. 4, Exs. 27 and 28. The Arbitrator denied MKW's Motion for Reconsideration by written order stating that he lacked authority to revisit the Interim Award, and even if he had

authority to alter the award, he remained satisfied with the Interim Award because MKW's actions of hiring H2J was the first material breach of the Subcontract – not Simbeck's removal of its crew and equipment. Appendix F.

On December 8, 2020, Simbeck filed its Motion for Award of Attorneys' Fees and Costs. C.R.R. 4, Ex. 29. After the parties completed the briefing on Simbeck's Motion, the parties presented testimony and participated in a hearing before the Arbitrator on January 11, 2021. Appendix C.

On February 17, 2021, the Arbitrator issued the Final Award. *Id.* The Final Award, including attorneys' fees and costs, totaled $597,778.23. *Id.*, p. 3.

STANDARD OF REVIEW

"The scope of judicial review of an arbitration award is strictly limited to the statutory provisions governing arbitration." *Duchscher v. Vaile,* 269 Mont. 1, 4, 887 P.2d 181, 183 (1994). After a matter has been submitted to binding arbitration, district courts "are not permitted to review the merits of the controversy, but may only confirm, vacate, modify, or correct an arbitration award pursuant to §§ 27–5–311, –312, and –313, MCA." *Teamsters Union Local No. 2, Int'l Bhd. of Teamsters v. C.N.H. Acquisitions, Inc.*, 2009 MT 92, ¶ 14, 350 Mont. 18, 204 P.3d 733. The party seeking to vacate an arbitration award bears the burden of proving that one of the statutorily enumerated grounds exists. *Dick Anderson Const., Inc. v. Monroe Const. Co., L.L.C.*, 2009 MT 416, ¶ 26, 353 Mont. 534, 221 P.3d 675.

A reviewing court must be highly deferential to an arbitrator's decision and "may not substitute its own legal conclusions and factual findings, even if the arbitrator's are clearly erroneous." *City of Livingston v. Montana Public Employees Ass'n*, 2014 MT 314, ¶ 44, 377 Mont. 184, 339 P.3d 41 (McKinnon J., concurring). "It is well-settled that a court's power to vacate an arbitration award must be extremely limited because an overly expansive judicial review of arbitration awards would undermine the litigation efficiencies which arbitration seeks to achieve." *Id.* (quotation omitted).

A decision on an arbitration award should be reviewed like 'any other district court decision . . . accepting findings of fact that are not 'clearly erroneous' but deciding questions of law de novo.'" *City of Livingston*, ¶ 11 (quoting *First Options, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995) (concurrence)).

Here, since the District Court's decision turned on the correct application of the statutory provisions governing review of arbitration awards, the standard of review is de novo. *See Id.* (holding when a district court's decision turns on whether it correctly applied the statutory provisions governing review of arbitration awards, the ruling is reviewed de novo); *Citibank (S. Dakota) N.A.* v. *Dahlquist*, 2007 MT 42, ¶ 8, 336 Mont. 100, 152 P.3d 693 (holding a district court's conclusions of law are reviewed de novo.) Under the de novo standard of review, this Court is not required to give deference to the district court's order subject to appeal. *See Johnson v. Costco*

Wholesale, 2007 MT 43, ¶ 19, 336 Mont. 105, 152 P.3d 727; *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 14, 369 Mont. 322, 298 P.3d 419 (holding no deference is required to be given to trial court's resolution of questions of law).

SUMMARY OF THE ARGUMENT

The District Court's Order vacating the Awards should be overturned because: (i) the Arbitrator did not manifestly disregard Montana law, (ii) failing to issue a "reasoned award" does not provide grounds to vacate an arbitration award under § 27-5-312(1)(c), Mont. Code Ann., (iii) in any event, the Arbitrator's Awards constitute "reasoned awards," (iv) the District Court improperly adopted verbatim MKW's Proposed FOFCOL, (v) the District Court's Order would frustrate the principles of efficiency and finality underlying the MUAA, and (vi) Simbeck is entitled to an award of its attorneys' fees by virtue of the parties' agreement and § 28-2-2101, Mont. Code Ann.

For the reasons set forth herein, this Court should reverse the District Court's Order vacating the Awards and confirm the Awards pursuant to § 27-5-312(5), Mont. Code Ann. ("If the application to vacate is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.")

A. The Arbitrator did not manifestly disregard Montana law.

The District Court erred because the grounds relied upon to vacate the Awards do not rise to the high level required to set aside an arbitration award for manifest

disregard of the law. In Montana, the manifest disregard of the law standard arises out of the evident partiality provision of § 27-5-312(1)(b), Mont. Code Ann. To conclude that an arbitrator rules in manifest disregard of the law requires more than simply a misapplication of the law by the arbitrator. *Geissler v. Sanem,* 285 Mont. 411, 416, 949 P.2d 234, 238 (1997). The test for manifest disregard of the law requires that the arbitrator appreciate the existence of a clearly governing legal principle but consciously decides to ignore or pay no attention to it. *Id.* Here, the District Court erred because the Awards do not reflect that the Arbitrator appreciated the existence of a clearly governing legal principle but consciously chose to ignore it. Indeed, the record reveals the contrary.

B. Montana law does not support vacating an arbitration award based on the form of the award.

Montana law does not support the District Court's conclusion that a party may vacate an arbitration award under section 27-5-312(1)(c), Mont. Code Ann., based on the form of the award. The Montana Supreme Court has explained that an arbitrator exceeds his or her powers under § 27-5-312(1)(c), "if she attempts to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement." *City of Livingston*, ¶ 20. This statutory provision does not support a motion to vacate an arbitration award based upon the form of the award. The District Court's Order should be reversed because it is not supported by Montana law governing the Montana Uniform Arbitration Act ("MUAA").

The Order is also incorrect because it is based upon the premise that the parties did not agree to a "reasoned award." However, the District Court cited to the Scheduling Order which provides:

> **Form of Award:** The Arbitrator shall issue a *Reasoned Award* at the conclusion of these proceedings.

Appendix A, p. 4; *see also* Appendix E, p. 3 (emphasis added). Despite the parties' agreement, the District Court found that the Awards should have been issued in the form of a "reasoned opinion" and the Order relies heavily on the supposed distinction between a "reasoned opinion" and a "reasoned award". None of that analysis by the District Court stands up to scrutiny as the Order acknowledges that Simbeck and MKW agreed that the Arbitrator would issue a "reasoned award".

C. Even if Montana law did support vacating an arbitration award based on the form of the award (which it does not), the Awards constitute "reasoned awards".

The District Court's Order should also be reversed because the Awards constitute "reasoned awards". Arbitration awards are generally issued in the form of a standard award, reasoned award, or findings of fact and conclusions of law. At one end of the spectrum is a standard award and at the other end is the form of findings of facts and conclusions of law. A reasoned award fits between those two types of awards. "A reasoned award is something short of findings and conclusions but more than a simple result." *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011). "A 'reasoned' award is an award that is provided with or

marked by the detailed listing *or mention* of expressions or statements offered as a justification of an act—the 'act' here being, of course, the decision of the [arbitrator]." *Id.* (emphasis in original).

Here, the Arbitrator issued a fifteen-page Interim Award addressing the background facts of the underlying project, the evidence presented at the arbitration hearing, the facts and evidence supporting the Arbitrator's finding that MKW breached the Subcontract and the covenant of good faith and fair dealing, the damages arising out of MKW's breaches, and Simbeck's award of attorneys' fees and costs. Appendix B. The Arbitrator was not required to go further than it did to meet the standard of a "reasoned award."

D. The District Court improperly adopted MKW's verbatim proposed FOFCOL.

Although adopting verbatim the proposed findings and conclusions submitted by a party is not reversable error, this Court has repeatedly discouraged the practice. *See Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 55, 346 Mont. 507, 198 P.3d 219; *see also Sawyer-Adecor Intern., Inc. v. Anglin*, 198 Mont. 440, 447, 646 P.2d 1194, 1198 (1982) ("We continue to disapprove, heartily and stoutly, the verbatim adoption of proposed findings and conclusions.")

The District Court's disregard for the parties' agreement to a "reasoned award" demonstrates why there is a legitimate concern for a lack of due consideration with the practice of verbatim adoption.

E. The Order undermines the interests the MUAA seeks to promote and deprives Simbeck of its bargained-for benefits under the binding arbitration clause.

The District Court's Order is inconsistent with the policies the MUAA seeks to promote because it deprives Simbeck of the significant benefits conferred by arbitration. "Arbitration allows parties to engage decision-makers who are technically skilled or trained in the specific area of industry that is subject to dispute and to expedite the resolution of disputes by avoiding many of the formalities inherent in civil litigation." *Dick Anderson Const.*, ¶ 38. The limited scope of arbitration "provides a more stringent finality to disputes than traditional litigation by limiting the scope of judicial review of an arbitration award." *Id.* Allowing a district court to make evidentiary determinations on an issue previously submitted to binding arbitration "would undermine the finality and expediency provided by arbitration." *See Id.*

F. Simbeck is entitled to attorneys' fees and costs at every stage of the litigation.

Simbeck, as the prevailing party in arbitration, is entitled to its attorneys' fees at every stage of this litigation. This entitlement arises from a contract between the parties and the agreement between the parties at the conclusion of the arbitration

hearing. Appendix B, ¶ 71; *see also Kenyon-Noble Lumber Company v. Dependant Foundations, Inc.*, 2018 MT 308, ¶ 28, 393 Mont. 518, 432 P.3d 133. As this appeal and the proceedings in the District Court are merely another step in the litigation process, Simbeck is entitled to its fees and costs. Additionally, Simbeck is entitled to its fees and costs because this is a civil action resulting from a construction contract. Mont. Code Ann. § 28-2-2101.

ARGUMENT

I. The District Court erred in concluding that the Arbitrator manifestly disregarded Montana law.

The District Court's conclusion that the Arbitrator manifestly disregarded Montana law should be reversed because: (i) it is unsupported by the text of the Awards, and (ii) there is no evidence that the Arbitrator blatantly disregarded a clearly governing principle of Montana law.

As the party moving to vacate the Arbitrator's award, MKW carried the burden of demonstrating that the Arbitrator was: (i) aware of a clearly governing principle of Montana law, and (ii) blatantly refused to follow a clearly governing principle of Montana law. *Roberts v. Lame Deer Public School Dist. No. 6*, 2013 MT 358, ¶ 12, 373 Mont. 49, 314 P.3d 647; *see also Tedesco v. Home Savings Bancorp, Inc.*, 2017 MT 304, ¶ 43, 389 Mont. 468, 407 P.3d 289 (citation omitted). Whether the Arbitrator correctly applied the law is not the issue. *Tedesco*, ¶ 52 (citing *Geissler*, 285 Mont. at 417, 949 P.2d at 238). MKW was required to prove

that the Arbitrator "blatantly refused to follow" Montana law or, stated differently, that the Arbitrator appreciated "the existence of a clearly established governing legal principle, but simply decide[d] to ignore or pay not attention to it." *Hughes v. Hughes*, 2013 MT 176, ¶ 53, 370 Mont. 499, 305 P.3d 772 (citation omitted).

The only principle of Montana law identified in the Order is the quote of the opinion in *Davidson* that, "[w]hether a breach is material or not is a matter of objective reasonableness rather than the non-breaching party's purely subjective belief." Appendix A, p. 5. As a prefatory matter, for reasons discussed below, that citation and the principles therein do not evidence a clearly governing principle of Montana law. However, irrespective, there is no evidence that the Arbitrator blatantly refused to follow the opinion in *Davidson*. *See* Appendix B.

The Interim Award includes numerous paragraphs explaining the objective reasons why the Arbitrator found that MKW materially breached the Subcontract and the implied covenant of good faith and fair dealing:

- [Simbeck] was the successful bidder for the lining work and subcontracted with MKW to install approximately 51,200 sq. yds. of lining material. Appendix B, ¶ 2;
- When the lining work was finally ready to be commenced at the end of October of 2019, there were no contractually agreed upon or expected durations for the lining work. The lining work would be controlled by the winter weather conditions actually experienced at the mine. *Id.*, ¶ 6;

- [MKW's Project Manager] did not inform [Simbeck] that it was intending to hire H2J to perform lining work on the project in mid-December. *Id.*, ¶ 9;

- There were differences of opinions about how much bedding liner work had been and was being prepared by MKW ahead of [Simbeck's] lining work. Those differences of opinion are not material since the undisputed evidence was that the quality of the [Simbeck] work was satisfactory and MKW did not believe it would be justified in terminating [Simbeck] based upon the speed of the performance of the work. The only justification for the termination in the mind of [MKW's Project Manager] was the fact that [Simbeck] pulled its equipment off-site without prior notice. *Id.*, ¶ 11;

- [Simbeck] had a contract with MKW to install all of the required lining at the mine. *Id.*, ¶ 14;

- The fact that the payment term was unit pricing did not change the scope from being all of the required lining which was anticipated to be approximately 51,200 yds of lining. *Id.*, ¶ 16;

- When MKW hired H2J, which in its mind, was to supplement the work of [Simbeck], it anticipated reducing the scope of [Simbeck's] work in a material way. *Id.*, ¶ 17;

- If MKW had requested permission from [Simbeck] and obtained permission from [Simbeck] in the form of some kind of change to the then existing subcontractor to bring in another contractor in order to speed up the lining work, there would not have been a material breach of the subcontract. *Id.*, ¶ 18;

- While [MKW's Project Manager] and MKW did not intend to breach the subcontract with [Simbeck] by hiring H2J, MKW did breach the subcontract by hiring H2J to perform a material portion of the scope of the [Simbeck] subcontract. *Id.*, ¶ 19;

- [MKW's Project Superintendent] and [MKW's Project Manager] both testified that they thought that the mine would be "fair" with [Simbeck] in paying for taking away scope of work – but they never had any discussions about that with [Simbeck] about that [sic] either before or after hiring H2J. *Id.*, ¶ 20;

- Having breached the subcontract by hiring H2J, MKW had many opportunities to remedy its breach. But MKW failed to do so. *Id.*, ¶ 24;

- Prior to the date MKW terminated [Simbeck] (12/31) MKW had received payment from the mine for both the November and December draws. The December draw was paid by the mine within ten days of submission (rather than a more typical 30 cycle). The accelerated payment was apparently made by the mine at the request of MKW. Despite having received both payments from the mine (including an accelerated payment) MKW refused to make any payment to [Simbeck], failed to inform [Simbeck] that it had received both the payments, but simply stated that it would pay according to the terms of the subcontract. The actions were not reasonable. The actions breached the covenant of good faith and fair dealing. *Id.*, ¶ 28;

- While [Simbeck] could have talked to MKW about what was going on. However, under the circumstances and facts and prior history, it was not unreasonable for [Simbeck] not to discuss the matter and its belief that it was being replaced before it removed its equipment off site. It was reasonable for [Simbeck] to assume that MKW could and likely would refuse to all [Simbeck] to remove its equipment from the site. *Id.*, ¶ 30;

- [MKW's Project Manager's] opinion was that MKW did not need to inform [Simbeck] that it was hiring another contractor to perform work that was part of the scope of [Simbeck's] subcontract. [MKW's Project Manager] misunderstood his contractual legal obligations to [Simbeck]. *Id.*, ¶ 34;

- It is noted that the third party engineer, Knight Piesold, apparently interpreted, from its observations, that MKW hired H2J as a replacement of [Simbeck]. *Id.*, ¶ 35;
- Since MKW breached its subcontract with [Simbeck], [Simbeck] is entitled to recover damages from MKW. *Id.*, ¶ 41;
- Since the arbitrator finds that MKW breached the subcontract by hiring H2J to replace or supplement [Simbeck], MKW is not entitled to recover damages against [Simbeck]. *Id.*, ¶ 59; and
- For MKW to prove damages from [Simbeck] failing to meet a given production rate or a given schedule duration, MKW would have needed to prove that there was a contractually agreed upon production rate or contractually agreed upon schedule duration. The evidence was that there was no contractually agreed upon production rate or a given schedule duration. The evidence is that [Simbeck] used a production rate in developing its estimate but that production rate was never part of the subcontract. Further, the evidence was that the parties never agreed upon a schedule duration or production rate after the project was delayed into the harsh winter weather. *Id.*, ¶ 68.

The paragraphs set forth above demonstrate why the District Court was incorrect when it stated in the Order, "The Interim Award is rife with the Arbitrator's findings of Simbeck's subjective beliefs, but utterly lacking in the required objective analysis of the material breach issue." Appendix A, p. 8.

The paragraphs of the Interim Award set forth above demonstrate that the Arbitrator conducted an objective analysis and did not refuse to follow or adhere to the opinion in *Davidson* that, "[w]hether a breach is material or not is a matter of objective reasonableness rather than the non-breaching party's purely subjective

belief." The Arbitrator explained the numerous reasons why MKW materially breached the Subcontract by hiring H2J to perform a material portion of Simbeck's scope of work under the Subcontract. Appendix B, ¶ 19.

The Interim Award explains that Simbeck was entitled to perform all of the lining work under the Subcontract and that MKW hired H2J to perform the work which Simbeck was exclusively entitled to perform. *Id.*, ¶¶ 14, 16-19. The Arbitrator also noted that the project engineer, Knight Piésold, believed that MKW hired H2J as a replacement for Simbeck. *Id.*, ¶ 35. The citation to the belief of Knight Piesold in the Interim Award demonstrates that the Arbitrator was establishing the objective reasons why MKW materially breached the Subcontract.

Since there is simply no language in the Awards to suggest that the Arbitrator made a conscious decision to disregard the opinion in *Davidson* (or any other legal principle), the Order is erroneous and should be reversed.

A. The District Court erred in concluding that the Arbitrator was aware of a clearly governing principle of Montana law because no Montana court has directly addressed the meaning of "objective reasonableness" in the context of breach of contract actions.

The District Court's Order should be reversed because the Arbitrator did not disregard any clearly governing principle of Montana law. The Order relies upon the quote that, "[w]hether a breach is material or not is a matter of objective reasonableness rather than the non-breaching party's purely subjective belief," *Davidson*, ¶ 23, in order to satisfy the first prong of the manifest disregard of the law

standard. *Roberts*, ¶ 12 (For reversal under the manifest disregard of the law standard, an arbitrator must have been aware of a clearly governing principle of Montana law.)

However, no Montana court has directly addressed the meaning of "objective reasonableness" in the context of a breach of contract action. The absence of caselaw on the meaning of "objective reasonableness" demonstrates that there is no *clearly* governing principle of Montana law that was disregarded by the Arbitrator. *See Geissler*, 285 Mont. at 416-18, 949 P.2d at 237-39 (holding that the manifest disregard of law standard requires the party challenging an arbitration award to identify a clearly governing principle of Montana law); *see also Hughes*, ¶ 57 (ambiguity surrounding the appropriate measure of damages did not permit this Court to conclude that the arbitrator disregarded clearly established Montana law).

Davidson is the only Montana case dealing with this 'objective reasonableness' in the context of breach of contract actions and it cited to Williston on Contracts § 63.3 (4th Ed. 2018). *Davidson*, ¶ 23. Williston in turn cited to a single case—a First Circuit Court of Appeals case, *Gibson v. City of Cranston*, 37 F.3d 731, 737 (1st Cir. 1994). In *Gibson*, the First Circuit noted that the determination of materiality "must be based largely on a standard of objective reasonableness rather than purely subjective belief…In other words, a party cannot transmogrify a provision that, from an objective standpoint, has only marginal significance into one

of central salience by the simple expedient of saying in retrospect that she believed it to be very important." *Id*. (citations omitted). As *Gibson* makes clear, the objective reasonableness standard looks to the materiality of the breach itself and is not applicable to the analysis of which party breached. This law stands for the principle that a party's subjective belief as to the materiality of a provision cannot transform an immaterial breach into a material breach.

The District Court's Order did not cite any Montana law that establishes a trier of fact cannot take subjective matters into consideration in determining whether a party breached the contract. Further, the determination of which party breached a contract is separate and distinct from the determination of whether a breach is material. *See, e.g., R.C. Hobbs Enterprises, LLC v. J.G.L. Distrib., Inc.*, 2004 MT 396, ¶ 33, 325 Mont. 277, 104 P.3d 503 (explaining distinction between material and immaterial breaches).

Accordingly, this Court should reverse the District Court's Order because MKW failed to meet its burden of proving that the Arbitrator was aware of a clearly governing principle of Montana law and disregarded it.

B. Perspective and belief were relevant to the Arbitrator's analysis of the claims for breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, constructive fraud, and the issue of punitive damages.

The District Court's conclusion that perspective and beliefs were "immaterial" is based on the incorrect premise that the parties only alleged

traditional breach of contract claims. In fact, Simbeck also asserted claims of breach of the implied duty of good faith and fair dealing, negligence, negligent misrepresentation, and constructive fraud. Appendix G, pp. 38-45. Simbeck also sought punitive damages in connection with its negligence, negligent misrepresentation, and constructive fraud claims, alleging that MKW acted with malice and the intent to harm Simbeck for its own economic benefit. Appendix G, p. 46. The Arbitrator's disposition of these issues implicated both parties' perspective, belief, and intent.

"The conduct required by the implied duty of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Mont. Code Ann. § 28-1-211. It is implied in every contract that the parties will deal with each other in good faith and not attempt to deprive the other of the benefits of the contract through dishonesty and or abuse of discretion in performance. *Knucklehead Land Co., Inc. v. Accutitle, Inc.*, 2007 MT 301, ¶ 18, 340 Mont. 62, 172 P.3d 116; *Story v. City of Bozeman*, 242 Mont. 436, 449, 791 P.2d 767, 775 (1990) (overruled on other grounds).

Analysis of whether a contracting party breached this duty often includes examination of the perspective, beliefs, and intent of the contracting parties. *See Richland Nat. Bank & Tr. v. Swenson*, 249 Mont. 410, 421, 816 P.2d 1045, 1052 (1991) (absent evidence to the contrary, the bank's honest belief that sound business

judgment warranted that it not make a loan was sufficient to defeat a claim of breach of the obligation of good faith and fair dealing); *see also Phelps v. Frampton*, 2007 MT 263, ¶ 39, 339 Mont. 330, 170 P.3d 474 (the party claiming breach of the duty must come forward with evidence supporting that they were deprived of their justified expectations and the justification of such expectations depends on the circumstances surrounding the contracting parties' relationship).

Further, MKW implicated this standard in its own counterclaim by stating, "[g]ood faith is derived from the transaction and conduct of parties. Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." C.R.R. 4, Ex. 20, ¶ 29.

Both negligent misrepresentation and constructive fraud claims—both of which Simbeck alleged—implicate the knowledge and beliefs of the parties. *See Deichl v. Savage*, 2009 MT 293, ¶ 19, 352 Mont. 282, 216 P.3d 749 (explaining elements of negligent misrepresentation); *see also Morrow v. Bank of America, N.A.*, 2014 MT 117, ¶ 62, 375 Mont. 38, 324 P.3d 1167 (explaining elements of constructive fraud).

Specifically, for its negligent misrepresentation claim, Simbeck alleged that MKW made untrue representations, MKW had no grounds for believing them to be true, MKW made them with the intent of inducing Simbeck to rely on them, and

Simbeck claimed it was unaware of their falsity and relied on them. Appendix G, pp. 43-44. For its constructive fraud claim, Simbeck alleged that despite MKW's duty of disclosure, MKW failed to disclose that it intended hire H2J, and gained an advantage for itself by misleading Simbeck. *Id.*, p. 44-45. In the underlying arbitration proceeding, Simbeck's claims required the Arbitrator to evaluate the knowledge, beliefs, and intent of the parties.

Finally, under § 27-1-221, Mont. Code Ann., punitive damages may be awarded when a defendant acts with malice. A showing of malice includes knowledge of facts or an intentional disregard of facts that create a high probability of injury to the plaintiff and the defendant deliberately acts with a conscious or intentional disregard or with indifference to a high probability of injury. *Id.* This standard's emphasis on knowledge, intent, reckless disregard, and indifference implicates the subjective intent of MKW. Therefore, the Arbitrator's discussion of MKW's intent, beliefs, and knowledge was not immaterial.

The Arbitrator's explanation and discussion of perspective, belief, intent, and other subjective language does not, alone, show that the Arbitrator intentionally and consciously refused to follow the "objective reasonableness" under *Davidson*. MKW bore the burden of proving that the Arbitrator consciously and intentionally disregarded Montana law based upon evident partiality standard. *See Dick Anderson Const.*, ¶ 26. "The partiality which will suffice to vacate an arbitration award must

be certain, definite and capable of demonstration; alleged partiality which is remote, uncertain or speculative is insufficient." *May*, 269 Mont. at 25, 887 P.2d at 189.

MKW did not meet this high burden because it was unable to demonstrate that there was anything inherently improper about the Arbitrator's discussion of belief and perspective. Further, the discussion of belief and perspective is relevant to Simbeck's claims for breach of the implied covenant of good faith and fair dealing, negligence, negligent misrepresentation, and constructive fraud as well as Simbeck's request for punitive damages.

Put simply, the District Court's ruling on the manifest disregard of law standard should be reversed because MKW did not meet its burden to prove: (i) the existence of a clearly governing principle of law, or (ii) that the Arbitrator blatantly failed to follow any such principle.

II. The District Court erred by finding that the Arbitrator exceeded the scope of his authority under § 27-5-312(1)(c) by failing to issue a "reasoned opinion."

The District Court improperly vacated the Arbitrator's Awards under § 27-5-312(1)(c) Mont. Code Ann., by erroneously concluding that the Awards did not constitute "reasoned awards." *See* Appendix A, p. 12. The District Court's ruling should be reversed for at least two reasons. First, under Montana law, a party cannot vacate an arbitration award based solely on the form of the award. And, second, the Awards clearly constitute "reasoned awards".

A. The District Court erred by vacating the Awards based on their form.

The District Court erroneously found that the Arbitrator exceeded his powers under § 27-5-312(1)(c), Mont. Code Ann., because the Awards did not constitute a "reasoned opinion." This Court should reverse the District Court's Order because § 27-5-312(1)(c) does not permit a Court to vacate an arbitration award based solely on the form of the award.

This Court has explained that an arbitrator exceeds his or her powers under § 27-5-312(1)(c), "if she attempts to resolve an issue that is not arbitrable because it is outside the scope of the arbitration agreement." *City of Livingston*, ¶ 20. Stated differently, "an arbitrator exceeds his powers when he decides matters which were not submitted to him." *Terra West*, ¶ 27.

MKW did not demonstrate, and the District Court did not find, that the Arbitrator decided an issue not submitted to him for consideration. In the Interim Award, the Arbitrator found that MKW materially breached the Subcontract and breached the implied covenant of good faith and fair dealing. Appendix B. There is no dispute that Simbeck presented those claims during the arbitration proceeding. Appendix G.

Instead, the District Court found that the Arbitrator exceeded his authority by issuing an opinion that was not sufficiently drafted because it was not in "the form to which the parties have agreed." Appendix A, p. 7-8. The District Court's ruling

to vacate the Arbitrator's award based upon the form relies upon § 27-5-312(1)(c), Mont. Code Ann. Although the District Court cites to that statute, § 27-5-312(1)(c) has never been found to support judicial review of the form of an arbitration award.

The District Court therefore exceeded its permissible scope of review of the Awards because such review "is strictly limited to the statutory provisions governing arbitration." *Duchscher*, 269 Mont. at 4, 887 P.2d at 183. Instead of relying upon Montana's statutory provisions, and the corresponding case law, the District Court improperly expanded its scope of judicial review by relying upon caselaw applying the Federal Arbitration Act ("FAA"). *See* Appendix A, p. 7 (*Western Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 262 (9th Cir. 1992); *Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.*, No. 18-cv-2714, 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019); *Vold v. Broin & Associates, Inc.*, 699 N.W.2d 482 (S.D. 2005)).

Since the District Court exceeded its permissible scope of review by looking to the form of the award, which is not contemplated by Montana statute, the District Court's Order is erroneous and should be reversed.

B. The District Court erred by making an arbitrary distinction between a "reasoned award" and a "reasoned opinion."

After relying on interpretations of the FAA to support its ruling that an arbitration award may be vacated based on the form, the District Court rejected the

federal cases identified by Simbeck by drawing an unsupported distinction between the terms "reasoned opinion" and "reasoned award." Appendix A, pp. 10-13.

The initial problem with the District Court's ruling on the form of the Awards is that it is based upon the incorrect conclusion that the parties did not agree to a "reasoned award." The most confusing aspect of that conclusion is that the District Court cites to the Scheduling Order:

> **Form of Award:** The Arbitrator shall issue a *Reasoned Award* at the conclusion of these proceedings.

Appendix A, p. 4; *see also* Appendix E, p. 3 (emphasis added). Then, without any explanation about why it is ignoring the Scheduling Order, in the next paragraph of the Order, the District Court "finds that the parties and the Arbitrator intended and agreed that the Arbitrator would issue a '*reasoned opinion*.'" Appendix A, p. 4 (emphasis added).

The only apparent reasoning for the District Court's decision is that R-47 of the Construction Industry Arbitration Rules (the "AAA Rules") lists a "reasoned opinion" as one type of specific form of an arbitration award. *See* Appendix I, p. 32 (C.R.R. 15, Ex. 40). Although R-47 of the AAA Rules lists a "reasoned opinion" as a type of award, the parties were free to agree to a "reasoned award."

The Subcontract was silent on the form of the award, stating only that the arbitration procedures would be pursuant to those "set forth in the Construction Industry Guidelines of the [AAA]." Appendix D, § 22. Rule R-47(c) of the AAA

Rules provides that the parties may agree to a form other than that provided in the rules and that the arbitrator shall issue an award in such form. Appendix I, pp. 32-33. Finally, Rule R-42 of the AAA Rules provides that a party who proceeds with arbitration after knowing that any provision or requirement of the rules has not been complied with is deemed to have waived the right to object. Appendix I, p. 31. Following its issuance, MKW never objected to the Scheduling Order or its listing of a "reasoned award" as the form agreed upon by the parties.

Here, the parties agreed that the Arbitrator would issue a "reasoned award." Appendix E, p. 3. Although R-47 of the AAA Rules lists a "reasoned opinion" as a type of award, MKW and Simbeck were free to choose a different form of award under R-47. There is no dispute that MKW and Simbeck agreed that the form of the award would be a "reasoned award." Appendix E, p. 3. Accordingly, MKW waived any objection to the form of the award being anything other than a "reasoned award."

The District Court's Order relies heavily on the supposed distinction between a "reasoned opinion" and a "reasoned award." Appendix A, pp. 10-13. The District Court rejected the cases identified by Simbeck outlining those jurisdictions' definition of a "reasoned award" by drawing an unsupported distinction between the terms "reasoned opinion" and "reasoned award." *See* Appendix A, pp. 10-13. The District Court's reasoning for rejecting the legal citations provided by Simbeck is flawed because it is based upon its conclusion that the AAA Rules no longer use the

term "reasoned award." Appendix A, p. 10. As shown above, the District Court's rejection of the definitions of a "reasoned award" was improper because MKW and Simbeck entered into an agreement for the Arbitrator to issue a "reasoned award." *See* Appendix E, p. 3.

There are no grounds for, nor did the District Court cite to any authority supporting, the distinction it drew between a "reasoned award" and a "reasoned opinion." The District Court's definition of a reasoned opinion required the application of the law to facts with citations or reference to the relevant legal authority and specific provisions of the Subcontract. Appendix A, p. 10. The District Court's definition of "reasoned opinion" must be incorrect because it has the same definition as findings of fact and conclusions of law, a more demanding form of opinion than a "reasoned award." *See, e.g., Byrum v. Andren*, 2007 MT 107, ¶ 52, 337 Mont. 167, 159 P.3d 1062 ("[T]he litmus test is whether a district court's order sets forth reasoning, based upon its findings of fact and conclusions of law, in a manner sufficient to allow informed appellate review."); *see also Edelen v. Bonamarte*, 2007 MT 138, ¶ 11, 337 Mont. 407, 162 P.3d 847 ("The court must also make factual findings and combine those with a logical, reasoned analysis and application of the law to the facts.")

Further, by defining a "reasoned opinion" in the same manner as courts define findings of fact and conclusions of law, the Order is inconsistent with the language

of R-47 of the AAA Rules, which lists findings of fact and conclusions of law as a separate and distinct form of awards. Appendix I, pp. 32-33.

C. The District Court erred by concluding the Awards were not "reasoned awards."

The District Court's Order should also be reversed because the Awards meet the requirements of a "reasoned award" under Montana law. Arbitration awards are generally issued in the form of a standard award, reasoned award, or findings of fact and conclusions of law. At one end of the spectrum is a simple result or standard award which simply announces a result without any reasoning or explanation. *Cat Charter*, 646 F.3d at 844. At the other end, findings of facts and conclusions of law is a more exacting standard arising out of the reasonably plain meanings of those terms as applied in courts of law. *Id.; see also Green v Ameritech Corp.*, 200 F.3d 967, 975 (6th Cir. 2000).

"A reasoned award is something short of findings and conclusions but more than a simple result." *Cat Charter*, 646 F.3d at 844 (citing *Sarofim v. Trust Co. of the West*, 440 F.3d 213, 215 n.1 (5th Cir. 2006). "A 'reasoned' award is an award that is provided with or marked by the detailed listing *or mention* of expressions or statements offered as a justification of an act—the 'act' here being, of course, the decision of the [arbitrator]." *Id.* (emphasis in original). "A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties." *Leeward Constr. Co.,*

Ltd. v. Am. Univ. of Antigua—Coll. Of Med., 826 F.3d 634, 640 (2d Cir. 2016). An eight-page arbitration award met the requirements of a reasoned award by laying out the facts of the case, describing the contentions of the parties, and deciding which of the two parties should prevail. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 474 (5th Cir. 2012).

The Arbitrator issued a fifteen-page Interim Award addressing: (i) the background of the parties and the facts of the underlying project, (ii) the testimony and evidence presented at the arbitration hearing, (iii) the facts and evidence supporting the finding that MKW materially breached the Subcontract, (iv) MKW's failure to cure its breach, (v) MKW's breach of the implied covenant of good faith and fair dealing, (vi) the damages arising out of MKW's breach of the Subcontract and the implied covenant of good faith and fair dealing, (vii) MKW's failure to mitigate its alleged damages, and (viii) Simbeck's award of attorneys' fees and costs. Appendix B. The details contained within the Interim Award satisfy the federal court standard that a "reasoned award is something short of findings and conclusions but more than a simple result." *Cat Charter*, 646 F.3d at 844. The Interim Award contains more details than the eight-page arbitration award which met the requirements of a reasoned award in *Rain CII Carbon*, 674 F.3d at 474.

The Arbitrator was not required to go further than it did because an arbitrator "need not delve into every argument made by the parties" for the award to meet the

standard for a "reasoned award." *See Leeward Constr.*, 826 F.3d at 640. MKW could have requested an award in the form of findings of fact and conclusions of law during the preliminary hearing had MKW desired a more detailed arbitration award. *See Ameritech Corp.*, 200 F.3d at 975-76 ("If parties to an arbitration agreement wish a more detailed arbitral opinion, they should clearly state in the agreement the degree of specificity required.") It also could have provided for findings of fact and conclusions of law as the form of the award in the binding arbitration clause it drafted in the Subcontract.

Thus, even if this Court decides to recognize the form of the award as a basis to vacate an arbitration award, the Awards constitute "reasoned awards." The District Court's Order should be reversed because it analyzes that question based upon an unsupported and inapplicable definition of "reasoned opinion."

D. In the alternative, this Court should order a rehearing before the Arbitrator.

In the Order, the District Court incorrectly concluded that it lacked the authority to remand the case to the Arbitrator following its determination that the Arbitrator exceeded his powers. *See* Appendix A, p. 12. Upon vacating the Awards on the grounds set forth in § 27-5-312(1)(c), the District Court had the specific authority to order a rehearing before the Arbitrator pursuant to § 27-5-312(4), Mont Code. Ann. Thus, in the alternative, Simbeck asks this Court to order a rehearing

before the Arbitrator if this Court upholds the District Court's determination that the Awards should be vacated pursuant to § 27-5-312(1)(c).

III. The District Court erred by adopting verbatim the proposed findings of fact and conclusions of law submitted by MKW.

This Court has repeatedly discouraged the practice of District Court adopting verbatim the proposed findings and conclusions submitted by a party. *See Bitterroot River Protective Ass'n*, ¶ 55; *see also Sawyer-Adecor*, 198 Mont. at 447, 646 P.2d at 1198 ("We continue to disapprove, heartily and stoutly, the verbatim adoption of proposed findings and conclusions.")

One reason for this Court's discouragement of the practice is that there is a legitimate concern for a lack of due consideration by district courts in the practice of verbatim adoption. S*ee Sawyer-Adecor*, 198 Mont. at 447, 646 P.2d at 1198. The District Court's Order illustrates why parties have a concern for a lack of due consideration by a district court adopting proposed findings and conclusions verbatim. The Order contains an obvious contradiction by citing to the parties' agreement in the Scheduling Order that the Arbitrator would issue a "reasoned award" before finding that that the parties' agreed that the Arbitrator would issue a "reasoned opinion." Appendix A, p. 4. The contradictory nature of those two findings raises a legitimate concern by Simbeck about whether the District Court in this case carefully considered the arguments, evidence, and briefing of the parties.

IV. The District Court's Order is inconsistent with the public policy behind the MUAA because it frustrates the parties' bargained-for benefits and obligations under the arbitration agreement.

The District Court's Order conflicts with the policies that the MUAA seeks to promote because it deprives Simbeck of the significant benefits conferred by arbitration. "Arbitration allows parties to engage decision-makers who are technically skilled or trained in the specific area of industry that is subject to dispute and to expedite the resolution of disputes by avoiding many of the formalities inherent in civil litigation." *Dick Anderson Const.*, ¶ 38. The limited scope of arbitration "provides a more stringent finality to disputes than traditional litigation by limiting the scope of judicial review of an arbitration award." *Id.* Allowing a district court to make evidentiary determinations on an issue previously submitted to binding arbitration, such as whether MKW materially breached the Subcontract, "would undermine the finality and expediency provided by arbitration." *See Id.*

It is well-settled that a court's power to vacate an arbitration award must be extremely limited because an overly expansive judicial review of arbitration awards would undermine the interests arbitration seeks to promote. *City of Livingston*, ¶ 14; *see also Nelson v. Livingston Rebuild Center, Inc.*, 1999 MT 116, ¶ 18, 294 Mont. 408, 981 P.2d 1185 (citation omitted).

MKW and Simbeck's chosen Arbitrator, Robert F. Babcock, is a civil engineer and attorney who specializes in construction project disputes and claims

resolution. C.R.R. 4, Ex. 12. At the time the parties chose him, the Arbitrator had over 30 years of experience representing parties from the construction industry. C.R.R. 4, Ex. 12. In choosing the Arbitrator, the parties engaged a decision-maker who was "technically skilled" and "trained in the specific area of industry" that was the subject of the underlying dispute. *Dick Anderson Const.*, ¶ 38. The District Court's decision to vacate the arbitration award and order resubmittal of the controversy to a new arbitrator deprives Simbeck of the significant benefits conferred by arbitration.

The District Court's decision to vacate the Arbitrator's Interim and Final Awards deprives Simbeck of the "stringent finality" that the parties contracted for in Section 22 of the Subcontract. Simbeck has been subject to all the "formalities inherent in litigation" that arbitration seeks to avoid. *Id.* In addition to the binding arbitration proceeding, Simbeck has been required to formally litigate this dispute in the District Court and now in the Montana Supreme Court. Further, if the District Court's Order stands, Simbeck would then be required to resubmit the matter to arbitration, beginning this lengthy process anew. Thus, the District Court's Order should be reversed because it has undermined the finality and expediency provided by arbitration. *See Id.*

V. Simbeck is entitled to attorneys' fees at every stage of this litigation.

The Arbitrator determined that Simbeck was the prevailing party in the arbitration and awarded attorneys' fees and costs pursuant to the parties' agreement at the conclusion of the hearing. Appendix B, ¶¶ 70-72. Following the Interim Award, Simbeck filed its Motion for Award of Attorneys' Fees and Costs. C.R.R. 4, Ex. 29. After the parties completed the briefing on Simbeck's Motion for Award of Attorneys' Fees, the parties participated in a hearing before the Arbitrator on January 11, 2021. Appendix C. Simbeck presented the testimony of its attorneys and MKW was given the opportunity to cross examine both witnesses.

On February 17, 2021, the Arbitrator issued the Final Award. Appendix C. The Final Award, including attorneys' fees and costs, totaled $597,778.23. *Id.*, p. 3. In the Final Award, the Arbitrator discussed the factors set forth in *Plath v. Schonrock*, 2003 MT 21, 314 Mont. 101, 64 P.3d 984. Based upon the Arbitrator's consideration of the *Plath* factors, Simbeck was awarded 70% of its attorneys' fees in the amount of $198,032.00 and costs in the amount of $51,806.00. Appendix C, p. 3.

A. Simbeck is entitled to fees and costs in the District Court and on appeal.

When an entitlement to costs and attorneys' fees arises from contract, that entitlement includes costs and attorneys' fees on appeal. *Kenyon-Noble*, ¶ 28; *see also Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 27, 356 Mont.

408, 235 P.3d 1269. "An appeal is simply another step in litigation and, as such, it is presumed that the contracting parties contemplate that award of attorney fees would include fees on appeal." *Boyne USA*, ¶ 26.

MKW and Simbeck agreed that the prevailing party was entitled to an award of attorney's fees and costs. First, the parties' Pre-Hearing Briefs made requests for attorneys' fees and costs. C.R.R. 4, Exs. 22 and 23. At the conclusion of the arbitration hearing, the parties also agreed that the Arbitrator was empowered to award attorneys' fees and costs to the prevailing party. Appendix B, ¶ 71. This agreement was consistent with the rules governing the arbitration proceeding as Rule R-48(d)(ii) of the AAA Rules empowers an arbitrator to award attorney fees if all parties have requested such an award. Appendix I, p. 33.

Simbeck's entitlement to attorneys' fees arises from contract, and accordingly Simbeck is entitled to fees and costs in the District Court and on appeal. *See Kenyon-Noble*, ¶ 28. Because the proceedings in the District Court, and now on appeal, are "simply another step" in the binding arbitration proceeding, Simbeck should be entitled to its attorneys' fees and costs at all stages. *See Boyne USA*, ¶ 26.

B. Simbeck is entitled to its attorneys' fees and costs in the District Court and on appeal under § 28-2-2105.

There is also statutory support for an award of attorneys' fees and costs to Simbeck as the prevailing party. Section 28-2-2105, Mont. Code Ann., provides that the prevailing party in a civil action to enforce an obligation under Title 28, Chapter

2, Part 21, is entitled to reasonable attorney fees and costs, both for trial and appeal. In its Pre-Hearing Brief, Simbeck alleged that these statutes applied to its claims against MKW. Appendix G. Further, the Arbitrator determined that these statutes applied in this matter, as demonstrated by the statutory interest of 1.5% per month that the Arbitrator assessed to a portion of Simbeck's damages pursuant to § 28-2-2104, Mont. Code Ann. *See* Appendix B, ¶ 47.

Accordingly, Simbeck is entitled to the award of its reasonable attorneys' fees and costs set forth in the Final Award and the attorneys' fees and costs incurred by Simbeck in the District Court and on appeal.

CONCLUSION

The judicial review performed by the District Court exceeded the scope allowed under the MUAA. The District Court's determination that the Arbitrator manifestly disregarded Montana law is incorrect and its ruling to vacate the Awards based upon the form of the award is not supported by Montana law. Additionally, the Awards satisfy the requirements of a "reasoned award".

Following the reversal of the District Court's Order vacating the Awards, this Court should confirm the Awards pursuant to § 27-5-312(5), Mont. Code Ann.

Finally, this Court should award Simbeck its attorneys' fees and costs incurred in the District Court and on appeal and remand the case back to the District Court to

determine the reasonable amount of such attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 27th day of January, 2022.

TARLOW STONECIPHER
WEAMER & KELLY, PLLC

/s/ Matthew A. Haus
Matthew A. Haus
Attorney for Appellant
Simbeck and Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2022 a copy of the foregoing document was served upon the following via the Montana Supreme Court e-filing system and email:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word for Office 365 is 9,990, excluding the cover page, table of contents, table of authorities, certificate of compliance and certificate of service.

Dated: January 27, 2022.

/s/ Matthew A. Haus

APPENDIX TABLE OF CONTENTS

APPENDIX A

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FILED

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

BY _____ DEPUTY

M.K. WEEDEN CONSTRUCTION, INC., Applicant, -vs- SIMBECK AND ASSOCIATES, INC., Respondent.	Cause No. DV-21-204C HON. JOHN C. BROWN **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This matter came on for hearing on May 24, 2021 in the Courtroom at the Law and Justice Center in Bozeman, Gallatin County, Montana. Present in person at the hearing were Fred Simpson, counsel for the Applicant, M.K. Weeden Construction, Inc. ("MKW"), and Matthew A. Haus and Nicholas R. Vandenbos, counsel for the Respondent, Simbeck and Associates, Inc. ("SA"). Appearing by video were Mark D. Changaris, Duff Simbeck and Brendan Simbeck. Counsel for the parties presented argument at the hearing. At the conclusion of the hearing, the Court gave the parties the opportunity to file proposed Findings of Fact and Conclusions of Law for the Court's consideration. Having received proposed Findings of Fact and Conclusions of Law from both parties, the matter is now ready for determination. Based upon the parties' respective pleadings, and the arguments of counsel at the hearing, the Court enters the following:

FINDINGS OF FACT

1. MKW, as prime contractor, entered a contract with Stillwater Mining Company, as owner, for the Tailing Storage Facility Stage IV embankment raise at the East Boulder Mine (the "Project") owned by Stillwater Mining Company.

2. MKW and SA were parties to a Subcontract dated October 14, 2019 (the "Subcontract") under which SA was to perform certain lining work as part of the Project at the East Boulder Mine. See Exhibit C to MKW's Application.

3. The Subcontract provides, in relevant part, "Any disputes arising between the parties hereto as to the meaning and intent of the terms and conditions here of will be submitted to binding arbitration pursuant to the procedures set forth in the Construction Industry Guidelines for the American Arbitration Association." Subcontract at ¶ 22. The American Arbitration Association will hereafter be referred to as "AAA."

4. In December 2019, a dispute arose between MKW and SA, with each party claiming the other breached the Subcontract. SA served a Demand for Arbitration on MKW on or about January 14, 2020, through procedures provided by the AAA. MKW answered and filed a counterclaim. SA claimed that MKW breached the Subcontract by hiring another subcontractor to perform liner installation work on the project. MKW claimed that SA breached the Subcontract by stopping work and pulling off the project. The arbitration was captioned, In the Matter of the Arbitration Between Simbeck and Associates, Inc., a Colorado corporation, Claimant, v. M.K. Weeden Construction, Inc., a Montana corporation, Respondent, AAA Case No. 02-20-0000-1345 (the "Arbitration").

5. The parties selected AAA arbitrator Robert F. Babcock to serve as their Arbitrator.

6. Pursuant to Rule R-1(a) of the AAA Construction Industry Arbitration Rules (hereafter, "AAA Rules"), the parties' agreement to arbitrate included the AAA Rules. That Rule provides:

> The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American

Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute pursuant to the Rules of the AAA without designating particular AAA Rules.

7. The Arbitrator conducted a multi-day hearing at which both parties were represented by counsel in Bozeman, Montana, in October 2020.

8. The Arbitrator entered his Interim Award on November 24, 2020. In the Interim Award, the Arbitrator concluded that MKW breached the Subcontract and awarded damages to SA. The Arbitrator did not specifically determine whether SA's conduct amounted to a material breach of the Subcontract. Interim Award, ¶¶ 59-60.

9. The Arbitrator entered his Final Award on February 17, 2021.

10. MKW filed its Application to Vacate Arbitration Award which commenced this proceeding on February 26, 2021.

11. The Interim Award and Final Award are part of the record in this case as they are attached as Exhibits A and B, respectively, to MKW's Application, and Exhibits 26 and 37, respectively, to SA's Response in Opposition to MKW's Application. Other filings by the parties and orders from the Arbitration are attached as various exhibits to MKW's and SA's filings in this case. Neither party has lodged any objection to the relevance or authenticity of any of the filings from the Arbitration, and therefore, the Court takes judicial notice of the filings from the Arbitration pursuant to Rules 201 and 202, M.R.Evid. Likewise, both parties have filed relevant portions of the AAA Rules, and the Court takes judicial notice of them pursuant to Rules 201 and 202, M.R.Evid.

12. AAA Rule R-23(b) refers to Sections P-1 and P-2 of those Rules for "the issues to be considered at the preliminary hearing." Section P-2(a)(xviii) requires discussion of "the form of the arbitration award".

13. AAA Rule R-47(c) sets forth the options for the form of award, and states, in relevant part:

> (c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. . . . After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the Arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.

14. By letter of April 3, 2020, the AAA case manager confirmed that the Preliminary Conference was held on March 31, 2020, and enclosed a copy of the Arbitrator's Scheduling Order to counsel for the parties with a copy to the Arbitrator. See **Exhibit F** to MKW's Application.

15. The Scheduling Order (included as part of Exhibit F to MKW's Application) states, in relevant part:

> **Form of Award:** The Arbitrator shall issue a Reasoned Award at the conclusion of these proceedings.

The form of award was never changed.

16. The Court finds that the parties and the Arbitrator intended and agreed that the Arbitrator would issue a "reasoned opinion." First, this finding is consistent with the options for the form of award provided in AAA Rule R-47(c) . Second, MKW has asserted repeatedly throughout this case that the parties and the Arbitrator agreed that the Arbitrator would issue a "reasoned opinion," and SA has never challenged or contested this assertion in either its briefing or at the hearing.

17. Despite the parties' and the Arbitrator's agreement that the Arbitrator would issue a "reasoned opinion," the Arbitrator referred to his "findings" in paragraph 72 of the Interim

Award. This was an apt description, because the Interim Award reads more like a set of factual findings, rather than an opinion, as will be discussed further below in the Conclusions of Law.

18. The Arbitrator was notified of a clearly governing principle of Montana law. In particular, at page 39 of its Pre-Hearing Brief[1] to the Arbitrator, SA stated the rule of law in Montana for determining whether a breach of contract is material as follows, "Whether a breach is material or not is a matter of 'objective reasonableness rather than' the non-breaching party's 'purely subjective belief.'" SA cited *Davidson v. Barstad*, 2019 MT 1 (*sic*), ¶ 23, 395 Mont. 1, 435 P.3d 640 for this rule of law.

19. Any of the following Conclusions of Law which may be deemed Findings of Fact are incorporated herein.

Based upon the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to Mont. Code Ann. §§ 27-5-322 and 27-5-114(1).

2. Venue is proper in this Court because the Arbitration was held in Gallatin County, Montana. Mont. Code Ann. § 27-5-323.

3. MKW's Application to Vacate Arbitration Award was timely filed because it was filed on February 26, 2021, which was within 90 days of the delivery of the copy of the Award to MKW. Mont. Code Ann. § 27-5-312(3).

4. Montana has adopted the "Uniform Arbitration Act". Mont. Code Ann. §§ 27-5-111- 27-5-324 ("MUAA"). The MUAA provides, in relevant part:

Vacating an award.

[1] A copy of SA's Pre-Hearing Brief is attached as Exhibit 22 to SA's Response in Opposition to MKW's Application.

> (1) Upon the application of a party, the district court shall vacate an award if:
> * * *
> (b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; [or]
>
> (c) the arbitrators exceeded their powers[.]

Mont. Code Ann. § 27-5-312(1)(b) and (c). The statute is framed in mandatory terms, as it provides that the court "shall vacate an award" if the statutory criteria have been met. *See City of Livingston v. Montana Public Employees Ass'n*, 2014 MT 314, ¶ 44, 377 Mont. 184, 339 P.3d 41 ("If a party applies to the district court to vacate an award for any of the reasons enumerated in § 27-5-312(1)(a)-(f), MCA, and the district court is satisfied that sufficient facts have been presented substantiating one of these subsections, then the district court 'shall' vacate the award of the arbitrator.") (McKinnon, J., concurring). MKW has moved the Court for an order vacating the Final Award, inclusive of the Interim Award, under both of the foregoing subsections. SA opposes MKW's motion, and seeks entry of an order confirming the Final Award pursuant to Mont. Code Ann. § 27-5-314,

5. The Montana Supreme Court has, "consistent with the majority of other jurisdictions," construed Mont. Code Ann. § 27-5-312(1)(b) to mandate that an award be vacated where the arbitrator manifestly disregards Montana law:

> We . . . conclude that when an arbitrator is aware of a clearly governing principle of Montana law, and blatantly refuses to follow it, the statutory conditions of § 27–5–312(1)(b), MCA, have in fact been met.

Geissler v. Sanem, 285 Mont. 411, 415-16, 949 P.2d 234, 237-38 (1997).

6. The Arbitrator's power was limited by the scope of the parties' agreement to arbitrate. "An arbitrator's authority is limited by the bounds of the [arbitration] agreement, and courts may vacate [arbitration] awards that extend beyond the contractual scope of arbitration."

City of Livingston, 2014 MT 314, ¶ 16 (*quoting Nelson v. Livingston Rebuild Center, Inc.*, 1999 MT 116, ¶ 15, 294 Mont. 408, 981 P.2d 1185). The arbitration agreement includes the AAA Rules as per Rule R-1(a), *supra,* Finding of Fact No. 6.

7. In *Nelson,* the Montana Supreme Court cited favorably to the South Dakota case of *Azcon Construction Co. v. Golden Hills Resort, Inc.*, 498 N.W.2d 630 (S.D. 1993) and the Wyoming case of *JBC of Wyoming Corp. v. City of Cheyenne,* 843 P.2d 1190 (Wyo. 1992). Those cases stand for the principle that an arbitrator exceeds his powers (thereby warranting an order vacating the award under Mont. Code Ann. § 27-5-312(1)(c)) when he acts in excess of the authority granted to him by the arbitration agreement. *Nelson,* 1999 MT 116, ¶ 16 (*citing Azcon* at 633-34). Thus, an arbitrator exceeds his powers by failing to enter an award in the form to which the parties have agreed, such that the non-conforming award must be vacated. *Western Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 262 (9th Cir. 1992) (construing "exceeding their powers" language under the Federal Arbitration Act, 9 U.S.C. § 10(d)); *Smarter Tools Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.*, 2019 WL 1349527, *4 (S.D.N.Y. 2019) ("Because the parties here agreed that the award should be 'reasoned,' the arbitrator exceeded his authority in issuing an award that does not meet the standard of a reasoned opinion."); *Vold v. Broin & Associates, Inc.*, 699 N.W.2d 482, 488-89 (S.D. 2005) (Affirming order vacating award because arbitrator exceeded his powers by failing to enter a "reasoned" award as required by "the rules he agreed to follow.") See Findings of Fact No. 15 and 16.

8. As explained in more detail below, the Court will vacate the Arbitrator's award pursuant to Mont. Code Ann. § 27-5-312(1)(b) and (c) because the Arbitrator:

(1) manifestly disregarded Montana law, which holds that whether a breach of contract is material is a matter of "objective reasonableness," and instead applied a standard based upon the allegedly non-breaching party's "purely subjective belief;" and

(2) exceeded his powers and authority by issuing the award in favor of SA which was inconsistent in form with AAA Rule R-47(c), the parties' arbitration agreement, and his own order requiring him to render a "reasoned opinion."

The Arbitrator Manifestly Disregarded the Law

9. The test for manifest disregard of the law requires that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. *Terra West Townhomes, L.L.C. v. Stu Henkel Realty*, 2000 MT 43, ¶ 35, 298 Mont. 344, 996 P.2d 866 (*citing Geissler, supra.*, 949 P.2d at 239).

10. As discussed in Finding of Fact No. 18, the Arbitrator was made aware of the clearly governing principle of Montana law that the standard to apply to determine whether a party materially breached a contract is an objective rather than a subjective standard.

11. Despite having the controlling standard of "objective reasonableness" squarely before him, the Arbitrator applied a subjective standard to find that SA did not breach the Subcontract by ceasing work and pulling off the job, and that MKW breached the Subcontract because, based upon SA's purely subjective belief, MKW had hired another subcontractor to replace it. The Interim Award is rife with the Arbitrator's findings of SA's subjective beliefs, but utterly lacking in the required objective analysis of the material breach issue. The Arbitrator admittedly determined material breach by solely relying on SA's subjective perspective as evidenced by the following paragraphs from the Interim Award:

12. Perspective is material to the decision as to which party breached the subcontract agreement.

21. From SA's perspective, it was aware that there was frustration on everyone's part about the speed of the performance of the lining work in November and December. SA also believed that its performance was in line with what could reasonably be performed under the conditions that then existed at the mine site which included the amount of repair work it was being directed to perform and the harsh weather conditions being experienced.

22. From SA's perspective, when it learned on Dec. 12th from H2J (and not MKW) that H2J was being hired, without notice to or discussion with SA to perform lining work on the site, it was reasonable under the circumstances and history of dealings between MKW and SA, that SA believed that MKW was intending to replace SA with H2J.

31. From SA's perspective, it was not intending to abandon its contractual obligations with MKW. From SA's perspective, the removal of the equipment was a protective measure it was taking in light of the actions of MKW.

Interim Award, pp. 3, 4, 8 (underlining in original).

12. The Arbitrator's erroneous fixation on SA's perspective and beliefs (*i.e.*, its purely subjective point of view) was irrelevant to the determination of what a reasonable person would determine based upon the facts of record because SA's subjective beliefs were only one half of the picture. As the Arbitrator was aware from SA's briefing, under *Davidson*, the question of material breach of the Subcontract is one of objective reasonableness, not subjective belief. This is not a question of the Arbitrator misapplying the law, which would not be subject to review by this Court, but instead it is a situation where the Arbitrator ignored a clearly governing principle of Montana law and substituted a standard not found in Montana. *See Ethyl Corp. v. United Steelworkers of America, AFL-CIO-CLC*, 768 F.2d 180, 184-85 (7th Cir. 1985) ("It is only when the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract (and not incorporated in it by reference, either, see *Jones Dairy Farm v. Local No. P–1236, United Food Workers*, 760 F.2d 173, 176 (7th Cir.1985)) that the award can be said not to "draw its essence from the [contract][.])"

13. Because the Arbitrator was aware of a clearly governing legal principle, but decided to ignore or pay no attention to it, MKW has shown that the Arbitrator manifestly disregarded the law, such that the Final Award, inclusive of the Interim Award, must be vacated pursuant to Mont. Code Ann. § 27-5-312(1)(b).

The Arbitrator Exceeded His Powers

14. Pursuant to AAA Rule R-47(c), the Arbitrator had the power, and the duty, to issue a "reasoned opinion" because that was the form of award to which the Arbitrator, MKW and SA agreed. The AAA Rules do not define a "reasoned opinion." MKW proposes that "reasoned opinion" must include an application of the law as applied to the facts of the case. Black's Law Dictionary defines an "opinion" as "The statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based." Black's Law Dictionary, Sixth Ed. (1990). SA has not proposed any competing definition of that term, nor has it shown that MKW's proposed definition lacks a basis in the law.

15. The Court concludes that MKW's proposed definition of a "reasoned opinion" is consistent with the common understanding of that term as Courts routinely issue "opinions" which include an application of the law to the facts of the case. It is axiomatic that "opinions" issued by this Court, the Montana Supreme Court, or any other Montana court of record necessarily include an application of the law to the facts of the case. The "spectrum" of awards referred to in prior case law relied on by SA discussing forms of arbitration awards is of marginal relevance with respect to this issue given the change in the AAA Rules on July 1, 2015[2], which no longer use the term "reasoned award." Rule R-47(c) now provides that "The

[2] See first page of AAA Rules filed by SA as Exhibit 40 to its Reply Brief.

parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law."

16. Here, the Arbitrator issued his 15 page Interim Award without reference to *any* meaningful provision of the Subcontract; without *any* citation or reference to any legal authority whether statute, case law or encyclopedia. The Arbitrator failed to even specify which section of the Subcontract that MKW breached, or explain by reference to either the Subcontract or *any* legal authority how MKW's actions constituted a breach of that agreement.

17. As discussed above, the Interim Award contained the Arbitrator's findings on the parties' subjective beliefs as to who breached the Subcontract, but that was as far as it went. Most glaringly absent from the Interim Award is *any* discussion of *any* legal authority supporting the decision. The Award cites not a single case, not a single statute, not a single legal rule or principle. Simply put, the award contains not a shred of legal analysis or "discussion of the law as applied to the facts of the case." In the absence of an application of the law to the facts of the case, the Award cannot constitute a "reasoned opinion."

18. The Interim Award is also entirely deficient as far as any analysis of the Subcontract, which was the basis of both parties' claims. Aside from a single reference in paragraph 23.j. of the Interim Award to paragraph 24 of the Subcontract (which referred to change orders and could not have been the basis of the Arbitrator's decision that MKW breached the Subcontract), the Interim Award contains no direct reference to or discussion of *any* provision of the Subcontract. Indeed, the Interim Award fails to even quote or cite the provision of the Subcontract that the Arbitrator determined MKW breached. Further, the Interim Award fails to offer any analysis to support the Arbitrator's determination that SA did not breach the

Subcontract when it unilaterally quit work on the Project. This is particularly troublesome in light of the Subcontract's Default Clause, paragraph 17, which provided, in relevant part:

> If in the opinion of [MKW], Subcontractor (i) breaches any term of this Subcontract; (ii) fails to provide sufficient skilled labor or materials of proper quality; . . . [or] (iv) fails to prosecute the Work promptly and diligently to promote the progress of the Project . . . [MKW] may, at its sole option, declare Subcontractor in default and terminate this Subcontract, effective 24 hours after written notice to Subcontractor.

19. In the absence of any legal analysis, and any analysis of the language of the Subcontract, the Interim Award cannot be considered a "reasoned opinion" because it provides no basis upon which the parties or the Court can assess the "reasoning" that the parties agreed would be a part of the award. The Arbitrator thus exceeded his powers by failing to issue a "reasoned opinion," and thus, the Court must vacate the Award pursuant to Mont. Code Ann. § 27-5-312(1)(c).

20. The Court has the authority and the duty to vacate an award that does not conform to the parties' agreement to arbitrate as being in excess of the arbitrator's powers, otherwise the party prejudiced by the award would be left without any remedy.

21. Contrary to SA's argument at the hearing, the Court does not have the authority to remand the case to the Arbitrator for clarification of his Award because remand to the Arbitrator is limited to the grounds set forth in Montana Code Annotated § 27-5-217. That section only allows for remand to correct an award "upon the grounds stated in 27-5-313(1)(a) and (1)(c)[.]" *Nelson*, ¶¶ 11-12.

22. When a party moves to vacate an award because the arbitrator exceeded his powers, the Court lacks the authority to remand the case to the Arbitrator. *Nelson*, ¶ 12. As this case involves an arbitrator exceeding his powers, and manifestly disregarding a clearly governing principle of Montana law, remand to Arbitrator Robert F. Babcock is not permitted

under Montana's Uniform Arbitration Act. Further, the AAA Rules do not explicitly give the Arbitrator the authority to re-write his opinion upon remand from a court. The AAA Rules only provide that the Arbitrator may correct clerical, typographical, technical, or computational errors. See AAA Rule R-51(a). Because this case does not involve a clerical, typographical, technical or computational error, remand is also unavailable under the AAA Rules.

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Attorney's Fees

23. SA's contention that the Arbitrator awarded attorney's fees pursuant to the Montana Prompt Payment Act, Mont. Code Ann. §§ 28-2-2101, *et. seq.*, as a basis for this Court to award SA its attorney's fees should it prevail in this action is not supported by the record. Instead, the Arbitrator awarded SA its attorney's fees pursuant to the parties' stipulation at the conclusion of the Arbitration hearing. Interim Award, ¶ 71. Although this Court will vacate the Award, even if it was confirming the Award, there is no basis in the contract or at law for an award of attorney's fees to SA in this proceeding. *Terra West Townhomes,* 2000 MT 43, ¶ 41.

24. Further, an award of attorney's fees under the Prompt Payment Act would be improper because the parties' agreement to arbitrate was unambiguously limited to claims under the Subcontract, which did not provide for an award of attorney's fees; the parties had not agreed to arbitrate claims arising under Montana's Prompt Payment Act. *See* Finding of Fact No. 3 ("Any disputes arising between the parties hereto as to the meaning and intent of the terms and conditions here of will be submitted to binding arbitration[.]"); *and see Black Hills Surgical Physicians, LLC v. Setliff,* 855 N.W.2d 407, 412-13 (S.D. 2014) (vacating arbitrator's award of attorney's fees as exceeding arbitrator's powers when the fee award was contrary to parties' agreement to arbitrate and based upon extraneous, statutory authority).

25. Any of the foregoing Findings of Fact which may be deemed Conclusions of Law are incorporated herein.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

The Final Award, inclusive of the Interim Award, entered in In the Matter of the Arbitration Between Simbeck and Associates, Inc., a Colorado corporation, Claimant, v. M.K. Weeden Construction, Inc., a Montana corporation, Respondent, AAA Case No. 02-20-0000-1345, is hereby VACATED. Pursuant to Mont. Code Ann. § 27-5-312(4), the parties shall submit their controversy to a new arbitrator to be selected as provided by the AAA Rules. Each party shall pay its own costs and attorney's fees herein.

DATED this 28 day of November, 2021.

HON. JOHN C. BROWN
District Court Judge

cc: Fred Simpson, Esq.
Matthew Haus, Esq.

email 11/29/21

CERTIFICATE OF SERVICE

I, Matthew Albert Haus, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-27-2022:

J. Fred Simpson (Attorney)
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Electronically Signed By: Matthew Albert Haus
Dated: 01-27-2022