

# PITTSBURGH LEGAL JOURNAL

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# PLJ

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## OPINIONS

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## COMMONWEALTH OF PENNSYLVANIA vs. VEGAS LESESNE

### *Allocation*

*Failure to grant defendant right of allocation constitutes legal error.*

CC# 201109618. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Howsie, J.

### OPINION

#### *Procedural Background*

In a criminal complaint dated July 18, 2011, Vegas Lesesne (“Defendant”) was charged at CC# 201109618 with one count of carrying a firearm without a license, one count of person not to possess a firearm, one count of aggravated assault, one count of disorderly conduct, one count of recklessly endangering another person, and one count of terroristic threats. On June 27, 2012, the Defendant appeared before the Honorable David R. Cashman and entered a guilty plea resolving the case. By Order of Sentence dated June 27, 2012, Judge Cashman sentenced the Defendant to eleven and a half months to 23 months confinement (paroled forthwith) followed by a three-year period of probation.

Multiple violations followed. By Probation Violation Order of Sentence dated April 4, 2016, Judge Cashman sentenced the Defendant to a three-year period of probation. By Probation Violation Order of Sentence dated December 4, 2017, Judge Cashman sentenced the Defendant to a five-year period of probation. By Probation Violation Order of Sentence dated September 13, 2021, Judge Cashman sentenced the Defendant to an aggregate period of incarceration of five to ten years. Subsequently, Judge Cashman vacated the September 13, 2021, sentence and ordered a PSI. By Probation Violation Order of Sentence dated December 6, 2021, Judge Cashman sentenced the Defendant to an aggregate period of incarceration of five to ten years.

On December 16, 2021, the Defendant filed a Post-Sentence Motion for Modification of Sentence. The Post-Sentence Motion was denied by operation of law. On January 5, 2022, the Defendant filed a Notice of Appeal to the Superior Court. Following Judge Cashman’s retirement, the case was reassigned to the Honorable Elliot C. Howsie. The Court ordered the Defendant to file a Concise Statement of Matters Complained of on Appeal. The Defendant raised two issues in the Rule 1925(b) statement:

1. In revoking and re-sentencing Mr. Lesesne to an aggregate revocation sentence of 5-10 years incarceration, the trial court abused its sentencing discretion because it failed to consider relevant and mandatory sentencing criteria; namely, the protection of the public, the gravity of the underlying offenses and nature of the violations, and the character, personal history, and rehabilitative needs of Mr. Lesesne, as required by 42 Pa.C.S.A. § 9721(b).

2. The trial court abused its discretion and/or committed an error of law where it failed to give Mr. Lesesne any opportunity to exercise his right of allocation, and personally address the trial court for the specific purpose of effecting his re-sentencing, at either the September 13, 2021, probation-violation hearing or the subsequent December 6, 2021 hearing.

#### *Discussion*

The Defendant’s contention that the trial court abused its discretion by failing to consider sentencing criteria is undermined by the record, applicable case precedent, and Pennsylvania sentencing law. The Defendant relies on 42 Pa.C.S.A. § 9721(b) and argues that Judge Cashman abused his sentencing discretion by failing to consider the need to protect the public, the gravity of the underlying offense, the nature of the violations, and the character, personal history and rehabilitative needs of the Defendant. The transcript shows that Judge Cashman did consider relevant sentencing factors before imposing sentence. Defense counsel updated the Court regarding the Defendant’s programming, which included completion of a reentry program, completion of the Thinking For a Change program and participating in parenting classes. *Probation Violation transcript, December 6, 2021, at 2*. Counsel advised the Court regarding the Defendant’s vocational training, including that the Defendant earned a masonry certificate and completed Safe Food safety training. *Id.* Judge Cashman was informed that the defendant was taking classes to obtain a GED. *Id.* The Court heard that the Defendant was diagnosed with PTSD and substance abuse and that JRS was recommending inpatient treatment at Pyramid. *Id. at 2-4*. Importantly, the record reflects that Judge Cashman ordered a PSI. *See Order of Sentence – Probation Violation, September 13, 2021*. The Supreme Court has held that “where pre-sentence reports exist, we shall continue to presume that the sentencing judge was aware of relevant information regarding the defendant’s character and weighed those considerations along with mitigating statutory factors.” *Commonwealth v. Devers, 546 A.2d 12, 18, (Pa. 1988)*. For these reasons, the Defendant’s claim that the sentencing court failed to consider relevant sentencing criteria is denied.

The sentence imposed complies with sentencing law governing revocation of probation. The Defendant cites 42 Pa.C.S.A. § 9721(b). However, 42 Pa.C.S.A. § 9771 governs revocation proceedings. The relevant portions of Section 9771 read as follows:

(a) General rule. - The court may at any time terminate continued supervision or lessen or increase the conditions upon which an order of probation has been imposed.

(b) Revocation. - The court may revoke an order of probation upon proof of the violation of specified conditions of probation. Upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to the time spent serving the order of probation.

(c) Limitation on sentence of total confinement. - The court shall not impose a sentence of total confinement upon revocation unless it finds that:

- (1) The defendant has been convicted of another crime; or
- (2) The conduct of the defendant indicates that it is likely he will commit another crime if he is not imprisoned; or
- (3) Such a sentence is essential to vindicate the authority of the court.

Before revoking probation and imposing a sentence of incarceration, Judge Cashman said, “Since our last hearing, I don’t see anything in it that would change the sentence that I previously imposed. He has had numerous chances at rectifying his behavior, and he has decided that he alone will control what he does; and unfortunately, he’s wrong about that.” *December 6, 2021, transcript, at 4*. The Defendant was convicted of a new crime, escape, at CC# 202102295. The sentence imposed complies with the mandates of Section 9771(c).

In the second issue, the Defendant claims that the trial court erred by denying his right of allocation. A review of the transcripts shows that the Defendant was not afforded the opportunity to address the court prior to the imposition of sentence. Pennsylvania Rule of Criminal Procedure 704(C)(1), in relevant part, provides that “At the time of sentencing, the judge shall afford the defendant the opportunity to make a statement in his or her own behalf.” The right of allocation is of paramount importance and sentencing courts have a mandatory duty to advise defendants of their right to address the court. Failure to grant

a defendant the right of allocution constitutes legal error. *Commonwealth v. Jacobs*, 900 A.2d 368 (Pa.Super. 2006). The record reflects that the Defendant was denied the right of allocution in these proceedings. The trial court erred in imposing sentence without hearing from the Defendant. Accordingly, the Court concedes the Defendant's second issue on appeal and holds that the Defendant shall be resentenced.

Date: 11-17-22

BY THE COURT:

/s/The Honorable Elliot C. Howsie, Jr.

**PENNENERGY RESOURCES, LLC vs.  
WINFIELD RESOURCES, LLC and MDS ENERGY DEVELOPMENT, LLC**

*Arbitration Award*

No. GD-19-008604. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ignelzi, J.

**OPINION**

***Procedural & Factual History***

PennEnergy Resources, LLC's ("PennEnergy") Petition to Vacate Arbitration Award was brought on June 13, 2019. The Respondents are Winfield Resources, LLC ("Winfield") and MDS Energy Development, LLC ("MDS"). The Arbitration Award was entered on May 14, 2019 against PennEnergy in the amount of \$2.4 million to MDS 2017-LP-Marcellus Shale Development, LP ("MDS 2017-LP"). (Petition to Vacate Arbitration Award at P. 2, L. 1, PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. June 13, 2019), ECF No. 1) ("Pet. to Vacate").

PennEnergy is a Delaware limited liability company with a principal place of business in Pittsburgh, PA. It explores, develops, and operates approximately 172,000 acres of oil and gas wells in Western Pennsylvania. (Id. at P. 8, L. 50).

Winfield is a Pennsylvania limited liability company based in Kittanning, Pennsylvania formed for the purpose of participating in a collective venture with PennEnergy. (Id. at P. 8, L. 51).

MDS is also a Pennsylvania limited liability company based in Kittanning, Pennsylvania. (Id. at P. 8, L. 53). MDS 2017-LP is a limited partnership and MDS acts as MDS 2017-LP's general partner. (MDS Energy Development's Respondent's Answer to Petitioner's Petition to Vacate Arbitration Award at P. 3, L. 14, PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. Nov. 16, 2020), ECF No. 33) ("MDS Answer").

PennEnergy initiated the arbitration in February of 2018 to resolve a contract interpretation issue centered on the notice provisions in the Joint Development Agreement ("JDA") between PennEnergy and Winfield. (Pet. to Vacate, supra, at P. 2, L. 2). The dispute involved the content of a notice related to Winfield's effort to transfer its interest in the collective venture. (Id. at P. 2, L. 4).

The JDA was agreed to in a previously executed Asset Purchase and Sale Agreement ("APSA"). (Id. at P. 2, L. 3). In February of 2012, PennEnergy, Winfield, MDS and other parties not named in this action entered into the APSA and agreed to form the later-executed JDA. (Pet. to Vacate, supra, at P. 9, L. 57), (MDS Answer, supra, at P. 1, L. 3). Under the APSA, PennEnergy acquired leasehold interests acquired by Winfield. (Pet. to Vacate, supra, at P. 9, L. 59). Under both agreements, PennEnergy would develop the acquired leases and Winfield would own a minority interest in that venture to be governed by the APSA, JDA, and subsequent Joint Operating Agreements. (Id. at P. 9, L. 61).

The JDA was executed in July 2012 by PennEnergy and Winfield. (Id. at P. 9, L. 60). The JDA governed the manner in which PennEnergy or Winfield could transfer their respective interests in the collective venture. (Id. at P. 9, L. 62). Under Section 6 of the JDA, Winfield was allowed to transfer their interest so long as proper notice was provided to PennEnergy, which would include assurance the transferee agreed to the terms and conditions in the JDA. (Id. at P. 9, L. 63).

In November and December of 2017, Winfield notified PennEnergy of its potential transfer of certain interests to MDS and provided PennEnergy with a draft notice of joinder naming MDS as the transferee. (Id. at P. 10, L. 64-65). PennEnergy responded that MDS would not agree to be bound by certain provisions in the JDA. (Id. at P. 10, L. 66). PennEnergy later provided its own draft of joinder, which Winfield did not execute. (Id. at P. 10, L. 67-68).

On February 5, 2018, Winfield and MDS executed a Purchase and Sale Agreement ("the PSA"). (Id. at P. 10, L. 71). The PSA states that the Seller (Winfield) agreed to sell, assign and transfer 9.93% of Winfield's Working Interest from its Participating Interest Share. (Id. at 351).<sup>1</sup> This Participating Interest Share was a result of the previously executed JDA. (Id.). The PSA also outlined how MDS 2017-LP would develop the Working Interest. (Id.).

On February 6, 2018, Winfield provided PennEnergy with a "Notice of Joinder" that potentially included evidence of an "assignment" of a portion of Winfield's interest in three contract areas to MDS. (Id. at P. 10, L. 69). MDS 2017-LP would own the interest, fund future development costs, and convey Winfield partnership units of MDS 2017-LP. (Id. at P. 11, L. 72). According to PennEnergy, witnesses stated during the arbitration that this was not disclosed to PennEnergy. (Id. at P. 11, L. 73).

On February 12, 2018, PennEnergy wrote to Winfield stating that the joinder failed to contain the provision that MDS would agree to "all the terms and conditions" of the JDA. (Id. at P. 11, L. 74). Both Winfield and MDS disagreed, maintaining that the joinder was a proper interpretation of the JDA. (Id. at P. 11, L. 75). PennEnergy then sent Winfield a "notice of dispute" related to the interpretation of the JDA, invoking the dispute resolution and arbitration provisions found in the JDA and APSA. (Id. at P. 11, L. 76).

Although there was an ongoing dispute, MDS attempted to forward funds from MDS 2017-LP to PennEnergy to pay for certain development costs. (Id. at P. 11, L. 77). PennEnergy states that it was unaware these funds came from MDS 2017-LP and returned the funds, believing the joinder to be infirm and that MDS did not agree to all the terms and conditions of the JDA. (Id. at P. 11, L. 78 – P. 12, L. 79).

On March 19, 2018, PennEnergy initiated the arbitration against Winfield, seeking a declaration as to the correct interpretation of the JDA as well as other relief. (Id. at P. 12, L. 80). In response, MDS filed an action against PennEnergy in the Court of Common Pleas of Armstrong County. (Id. at P. 12, L. 81). That Court later ordered MDS to arbitration in Allegheny County. (Id. at P. 13, L. 92).

On July 13, 2018 MDS filed a Counterclaim in the arbitration. (Id. at P. 14, L. 99). On January 11, 2019, a month before the arbitration hearing, MDS filed a Supplemental Counterclaim. (Id. at P. 14, L. 101). PennEnergy states that neither of these filings referenced MDS 2017-LP or that MDS was acting in a representative capacity. (Id. at P. 14, L. 100-02). MDS disagrees, stating that Winfield and the Arbitrator were aware that MDS had brought its claim for the benefit of MDS 2017-LP. (MDS Answer, supra, at P. 3, L. 14).

The Supplemental Counterclaim claimed that MDS "had been damaged in its own right, alleging that 'MDS executed the Assignment with the expectation that, among other benefits, it would be able to utilize the intangible drilling costs tax deductions for the development of the wellbores it acquired under the Assignment.'" (Pet. to Vacate, supra, at P. 14, L. 103). MDS claims that as a direct result of PennEnergy's tortious contractual interference, MDS and Winfield had no choice but to rescind the transfer because PennEnergy failed to recognize its validity after MDS and Winfield provided PennEnergy all that was required (a notice of joinder). (MDS Answer, supra, at P. 4, L. 17).



During discovery for the Arbitration, Winfield produced the PSA, which PennEnergy states was the first time they were made aware that MDS was the intermediary between Winfield and MDS 2017-LP.<sup>2</sup> (Pet. to Vacate, supra, at P. 13, L. 96). During discovery for the arbitration, PennEnergy moved to compel MDS to provide any information regarding the partnership (the limited partnership that was formed to hold the interest, MDS 2017-LP), which included financial information, because PennEnergy claimed that this information may inform the damages that MDS suffered as a result of their tortious interference with a contract claim. (Id. at P. 14, L. 105 & P. 15, L. 108-11). MDS opposed, and the Arbitrator sided with MDS, holding that PennEnergy was not entitled to conduct discovery into information concerning the partnership or where it allocated the funds initially set aside for the PennEnergy/Winfield venture. (Id. at P. 15, L. 114-15).

Before the arbitration, MDS claimed that it was damaged and that it had provided the consideration for the transfer and that it suffered a loss for the interests of which it had been deprived. (Id. at P. 16, L. 116). The arbitration later commenced on the issues above: what damages MDS suffered in its individual capacity, seeking a declaration as to the correct interpretation of the JDA, as well as other relief.

During arbitration, MDS's principal, Michael Snyder, testified that he was litigating on behalf of both MDS and MDS 2017-LP as its "representative" and its "fiduciary." (Id. at P. 16, L. 120). Mr. Snyder conceded that this representative status was not disclosed in MDS's claims but that, in his opinion, it was not a necessary disclosure. (Id. at P. 16, L. 121). In post-trial briefing, PennEnergy claimed that MDS 2017-LP must litigate for itself, believing that because of its "independent corporate existence," MDS could not litigate on behalf of MDS 2017-LP or if it did, it must disclose that MDS was acting in a fiduciary capacity. (Id. at P. 18, L. 139-40). PennEnergy further claimed that because "it had no arbitration agreement with MDS 2017-LP... it was beyond the Arbitrator's power to adjudicate that non-party's claim." (Id. at P. 18, L. 141). PennEnergy also claimed that non-party MDS 2017-LP could not recover for conduct amounting to a good faith dispute over contract terms. (Id. at P. 19, L. 142).

The Arbitrator, in his opinion issued on May 14, 2019, found against PennEnergy and ruled that PennEnergy tortiously interfered in the contract between Winfield and MDS. (Id. at P. 49, L. 5).<sup>3</sup> PennEnergy was required to pay MDS \$2.4 million in damages caused by the interference. (Id.) PennEnergy claims that the Arbitrator ignored certain issues such as which entity should be handling the claim and that the Arbitrator "treated MDS and MDS 2017-LP as the same entity." (Id. at P. 19, L. 143).

On June 13, 2019, PennEnergy filed the Petition to Vacate the Arbitration Award in the Allegheny County Court of Common Pleas. They seek amendment of the Award and that paragraph 5 of the Award be vacated.<sup>4</sup> (Id. at P. 22, L. 169).

#### **Analysis**

PennEnergy, in their Petition to Vacate the Arbitration Award as well as subsequent briefs and arguments, argues that the Arbitration Award should be vacated because of issues all stemming from whether MDS 2017-LP was a named party in the arbitration and whether it was able to recover from PennEnergy.

The issues PennEnergy claims include that it had no agreement to arbitrate with MDS 2017-LP, it was not allowed to conduct discovery on MDS 2017-LP by the arbitrator (which prejudiced its claim), MDS 2017-LP was not an intended beneficiary under the PSA, MDS cannot prosecute on behalf of MDS 2017-LP, and that PennEnergy did not tortiously interfere with the PSA, but that its conduct was instead a good faith dispute. PennEnergy argues that all of these issues are a result of the arbitrator exceeding his powers by awarding a "non-party" an award that caused an irregularity in the arbitration process and resulted in an unjust, inequitable, and unconscionable award. PennEnergy further argues the arbitrator conducted the arbitration in a manner that did not conform to the Pennsylvania Rules of Civil Procedure, and made a finding that a court would not have made, had the claim been litigated in court.

#### **I. Standard of Review**

In order to determine whether the Arbitration Award should be vacated or modified, we must first determine the appropriate standard of review to overturn an arbitration award.

The parties disagree on whether the statutory or common law standard for arbitration applies because of the different elements in the burden of proof.

42 Pa.C.S.A. Chapter 73 contains the Pennsylvania Uniform Arbitration Act ("UAA"). 42 Pa.C.S.A. § 7302(a) applies the standard for determining whether statutory or common law arbitration standards apply:

General rule. - An agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute, in which case the arbitration shall be governed by this subchapter.

42 Pa. C.S.A. § 7302(a).

Whether an arbitration agreement is subject to the UAA (Sections 7301-7320 of Subchapter A) or common law (Sections 7341-7342 of Subchapter B), the process and scope of judicial review arbitration principles depends on whether the agreement is in writing and expressly provides for arbitration under the UAA or other similar statute. (Emphasis added), *Sage v. Greenspan*, 765 A.2d 1139, 1141 (Pa. Super. Ct. 2000), appeal denied, 784 A.2d 119 (Pa. 2011).

In order to determine whether the arbitration itself is governed by statutory or common law standards, we can look to whether there was an agreement in writing on which standard should be applied.

The arbitrator addressed this issue in his opinion:

§ 11.5 of the JDA states that the JDA is the controlling agreement. The controlling arbitration agreement is § 11.10 of the JDA and § 11.10 states:

...(f) The arbitration shall proceed under AAA rules, except to the extent modified by this Agreement and shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq. The arbitrator(s) may, in their discretion, limit or expand discovery in any arbitration proceeding. Any arbitration award shall be a reasoned award.

...The clause is "broad" in describing the scope of this arbitration. At the commencement of the hearing on the merits, held on February 18 through 22, 2019, the Parties agreed and confirmed:

...5. The arbitration shall proceed under the AAA Rules and shall be governed by the Federal Arbitration Act, 9 U.S.C. Section 1, et seq. and the Commonwealth of Pennsylvania.

(Pet. to Vacate, supra, at 25-27).

Therefore, according to the JDA as well as the parties' agreement in the arbitration hearings, the Federal Arbitration Act applies.

Although the Federal Arbitration Act was the agreed upon standard in the arbitration, the UAA governs the standards of statutory arbitration in Pennsylvania:

An agreement to arbitrate a controversy shall be conclusively presumed to be an agreement to arbitrate pursuant to common law unless the agreement expressly provides for arbitration pursuant to statute, in which case Pennsylvania's statutory arbitration provisions will apply. See 42 Pa.C.S. § 7302(a). Here, the Agreement for Sale of the Home provides that the rules of the Federal Arbitration Act would apply as to any dispute between the Kopews and the Toll entities. See 9 U.S.C. § 1, et seq. However, as outlined in *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 576-77 (Pa. Super. 2006), when parties agree for the Federal Arbitration Act to apply as to a dispute within the jurisdiction of a Pennsylvania court, it is Pennsylvania law and not federal law which determines the applicable standard of review and appealability of the arbitrator's decision. Thus, the trial court and this Court are guided by Pennsylvania's statutory arbitration provisions.

*Kopew v. Toll Bros., Inc.*, 237 A.3d 1088, 2020 WL 3487555, 2020 Pa. Super. Unpub. LEXIS 2075, at \*2, n. 2 (Pa. Super. Ct. Jun. 26, 2020) (unpublished op.).<sup>5</sup>

Because this arbitration dispute is within the jurisdiction of a Pennsylvania court, it is Pennsylvania law that determines the applicable standard of review and thus, this Court will apply the UAA standard for vacating an arbitration award. The standard for vacating a statutory arbitration award is at 42 Pa C.S.A. § 7314.

PennEnergy also argues that the Pennsylvania Rules of Civil Procedure apply to this arbitration. PennEnergy's main argument is that the arbitration pleadings filed by MDS do not state that they represent MDS 2017-LP, in essence contravening the Pennsylvania Rules of Civil Procedure. However, it is longstanding Pennsylvania precedent that arbitration proceedings are not governed by the Pennsylvania Rules of Civil Procedure. "It is well established that arbitration proceedings are informal adversarial hearings in which the arbitrators are not bound by the technical rules of civil procedure." *Mitchell v. Prudential Prop. & Cas. Ins. Co.*, 499 A.2d 632, 636 (Pa. Super. Ct. 1985). Because arbitrators are not bound by the technical rules of civil procedure, this Court will not use these rules to determine if an arbitration award should be vacated solely based on technical issues.

## ***II. Real Party in Interest Issue***

This Court must also address PennEnergy's argument that MDS could not have represented MDS 2017-LP because MDS 2017-LP needed to represent itself in this matter. PennEnergy argues that "Pennsylvania indisputably requires... that 'all actions shall be prosecuted by and in the name of the real party in interest, without distinction between contracts under seal and parol contracts.'" Pa.R.C.P. No. 2002(a); (PennEnergy Resources, LLC's Omnibus Brief and Response in Support of Petition to Vacate Arbitration Award at 32, *PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC*, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. June 7, 2021), ECF No. 57) ("PennEnergy's Brief in Support"). PennEnergy also claims that because MDS 2017-LP was not a named entity on the pleadings, they cannot recover and MDS cannot represent MDS 2017-LP as the limited partnership's general partner.<sup>6</sup>

In response, MDS claims that PennEnergy essentially waived this defense because they did not raise the objection sooner in the arbitration process, stating that:

Under Pennsylvania law, 'defenses relating to the merits of the claim are part of the arbitrable controversy and must be decided by the arbitrator.' See *Messa v. State Farm Ins. Co.*, 641 A.2d 1167, 1170 (Pa. Super. Ct. 1994) (holding that, once the court determines that valid arbitration agreement exists, 'it is for the arbitrators to rule on the merits of the parties' claims and defenses.'). In raising the issues at such a belated point in the proceedings, PennEnergy waived the defense.

(MDS Energy Development, LLC's Respondent's Brief in Opposition to Petitioner's Petition to Vacate Arbitration Award at 15, *PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC*, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. Nov. 16, 2020), ECF No. 32) ("MDS's Brief in Opposition").

Although MDS argues PennEnergy effectively waived their objection based on the real party in interest issue, they concede above that PennEnergy raised this issue during the arbitration proceedings. In fact, Winfield argues that "PennEnergy raised this defense for the first time at the final hearing and devoted a page of its Post-Hearing Brief to arguing this defense. Judge Arnot considered the issue and issued the Final Award." (Winfield Resources, LLC's Brief in Opposition to Amended Petition to Vacate Arbitration Award and in Support of Request for Confirmation of the Award at 18, *PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC*, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. May 24, 2021), ECF No. 51) ("Winfield's Brief in Opposition").

MDS's claim that PennEnergy waived their defense of real party in interest simply fails. Judge Arnot considered the issue and ruled after PennEnergy raised the issue during arbitration. PennEnergy did not waive this defense.

Because PennEnergy did not waive their real party in interest objection, this Court must determine if MDS is a "real party in interest" and consequently, if MDS can sue on behalf of MDS 2017-LP. In essence, PennEnergy argues that MDS is not the real party in interest in the arbitration and cannot represent MDS 2017-LP in the arbitration.

"Pennsylvania courts have defined the word 'real party in interest' as 'the person who has the power to discharge the claim upon which suit is brought and to control the prosecution of the action brought to enforce rights arising under the claims.'" *Clark v. Cambria County Bd. Of Assessment Appeals*, 747 A.2d 1242, 1246 n.9 (Pa. Cmwlth. Ct. 2000).

In this case, MDS 2017-LP would be the real party in interest. However, under Pennsylvania law, general partners of limited partnerships may sue on behalf of limited partnerships. "The rules establish that a 'partner' is an individual who bears unlimited liability for the partnership obligations and, as such, is authorized to prosecute and defend actions arising from the partnership's activities." *In re Lawrence Cty. Tax Claim Bureau*, 998 A.2d 675, 680 (Pa. Commw. Ct. 2010). Further, "Partnerships are not recognized as separate entities like a corporation is; a limited partnership can only act through its designated agent (the general partner), and the general partner can be liable for the obligations of the limited partnership." *Id.* at 679. Therefore, MDS may litigate on behalf of MDS 2017-LP as the general partner of the limited partnership.

Although a general partner may litigate on behalf of its limited partnership, PennEnergy also argues that "Pennsylvania requires that where a party, such as a fiduciary, seeks to litigate on behalf of its principal, that representative capacity must be disclosed both 'in the caption and in the plaintiff's initial pleading.' Pa. R.C.P. No. 2002(b)(1)." (PennEnergy's Brief in Support, *supra*, at 35). As this Court determined above, arbitrators are not bound by the Pennsylvania Rules of Civil Procedure. Therefore, this Court will not vacate the arbitration award solely on the basis of technical and procedural issues.

## ***III. Standard for Vacating Arbitration Award***

This Court will now examine whether the arbitration award should be vacated based on the statutory arbitration standard. As determined above, the standard the Court will use to evaluate whether the arbitration award should be vacated is 42 Pa.C.S.A. § 7314.

§ 7314. Vacating award by court.

(a) General rule.--

(1) On application of a party, the court shall vacate an award where:

(i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable;

(ii) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party;

(iii) the arbitrators exceeded their powers;

(iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party; or

(v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing.

(2) The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

42 Pa.C.S.A. § 7314.

First, the Court will address section (a)(1)(i) of §7314, which, in essence, allows the Court to determine whether an arbitration award can be vacated based on the common law arbitration standard. 42 Pa. C.S.A. § 7341 contains the common law standard for vacating or modifying an arbitration award:

§ 7341. Common law arbitration.

The award of an arbitrator in a nonjudicial arbitration which is not subject to Subchapter A (relating to statutory arbitration), A.1 (relating to revised statutory arbitration) or a similar statute regulating nonjudicial arbitration proceedings is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

42 Pa.C.S.A. § 7341.

Simply stated, an award may not be vacated or modified unless a party was denied a fair hearing or that fraud, misconduct, corruption, or other irregularity caused an unjust, inequitable, or unconscionable award. PennEnergy does not allege that they were denied a hearing, nor that fraud, corruption, or misconduct took place, so this Court will not address those issues. PennEnergy, regarding this standard, only claims that an irregularity occurred in the arbitration process that caused an unjust and unconscionable award. (PennEnergy's Brief in Support, *supra*, at 24).

PennEnergy argues that the arbitrator caused an irregularity in the arbitration process by awarding MDS 2017-LP the award based on a good faith dispute over contractual language. PennEnergy further argues that the contractual breach of the JDA does not constitute tortious interference of a separate contract. In essence, PennEnergy states that the arbitrator should not have determined that PennEnergy tortiously interfered with a contract when PennEnergy claims there was merely a good faith dispute.

The arbitration process exists to solve disputes, to relieve the judicial system of an already voluminous docket. Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation... A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation." *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 289 (3d Cir. 2004).

The Plaintiff has sought to vacate the arbitration award based on the arbitrator ruling against the law, claiming that he should not have made the ruling because the Plaintiff believes they did not tortiously interfere with the contract at issue. This Court may not vacate an arbitration award based on error of law or fact:

Section 7314 of the Pennsylvania Uniform Arbitration Act delineates the circumstances under which a statutory arbitration award can be vacated by a court and an award contrary to law is not one such circumstance. Moreover, 42 Pa.C.S.A. § 7314(a)(2) expressly states that 'the fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.'

*Martin v. PMA Group*, 617 A.2d 361, 362-63 (Pa. Super. 1992).

Great deference is given to the arbitration decisions by reviewing courts. *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir.1989). This Court will not examine whether an error of law occurred in this case, when it is well-established precedent that courts may not vacate arbitration awards simply on errors of law.

PennEnergy also argues that the "non-disclosure" of MDS 2017-LP as a party on the pleadings and the "non-disclosure" of MDS acting in a representative capacity resulted in an unjust and unconscionable award because PennEnergy was not made aware of MDS 2017-LP.<sup>7</sup> PennEnergy claims that the arbitrator contravened numerous settled-legal principles, deprived Penn of a fair forum, and made an award to a party that could not have recovered in its own right.

As noted above, the Court has determined that MDS may litigate on behalf of MDS 2017-LP, acting as its general partner. Also noted above, PennEnergy knew of MDS 2017-LP before the arbitration hearing began; notably, when it attempted to conduct discovery into "the unnamed limited partnership." Frankly, this argument fails to reach the "unconscionable" and "unjust" standard. MDS is legally entitled to litigate on behalf of MDS 2017-LP and the fact that MDS 2017-LP was "not a named party" on the pleadings does not rise to the level of "unjust" or "unconscionable" that is required to vacate an arbitration award.

The next element to consider when a Court may vacate an arbitration award is whether there was evident partiality by the arbitrator. PennEnergy does not argue that the arbitrator exhibited any partiality towards the defendants, therefore this Court will not address this element.

Next, PennEnergy argues that the arbitrator exceeded his powers by claiming that the "non-disclosure" of the representative status of MDS resulted in an award that exceeded the arbitrator's powers and secondly, that MDS 2017-LP was not an intended beneficiary of the PSA and therefore, was not able to recover damages.

"The determination of whether an arbitrator 'exceeded his proper powers' depends upon whether the arbitrator decided a dispute over which he had no jurisdiction, or granted an award which is prohibited by law." (MDS's Brief In Opposition, *supra*, at 11-12), citing *Leechburg Area Sch. Dist. v. Leechburg Educ. Assn.*, 380 A.2d 1203, 1205 (Pa. 1977).<sup>8</sup>

PennEnergy argues that the arbitrator exceeded his powers because the arbitrator had no jurisdiction "when he awarded damages for injuries sustained by a third party not subject to an arbitration agreement or joined as a party to the arbitration" and



that when “he (the arbitrator) awards damages for a tort that the law does not recognize.” (PennEnergy’s Brief in Support, *supra*, at 27). Because the issue of whether there was an agreement to arbitrate between the parties is a separate element in 42 Pa.C.S.A. § 7314, this Court will address those arguments below.

PennEnergy states that the arbitrator exceeded his powers when he awarded damages for a tort that the law does not recognize by awarding damages to an unintended beneficiary under a claim of tortious interference with a contract. PennEnergy argues that the PSA stated that there will be no intended beneficiaries of that contract; and therefore, an unintended beneficiary is not allowed to recover damages based on tortious contractual interference. (PennEnergy’s Brief in Support, *supra*, at 40).

“The February 5, 2018 PSA, disclosed during the arbitration, specifically provided that: ‘No Third Party Beneficiary: Only the Parties hereto, their respective successors and permitted assigns are intended to benefit from this Agreement and no other Party, including the Limited Partnership, is intended to be a beneficiary hereof.’” (Id. at 40-41). “Further, the February 5, 2018 PSA defined the term ‘Limited Partnership’ to be ‘the MDS Partnership developing said working interest.’” (Id. at 41).

“In Pennsylvania, to have standing to recover for an alleged tortious interference with a contract, the plaintiff must be a party to the contract with which the defendant interfered, or, in limited circumstances, the intended third-party beneficiary of that contract.” (Id. at 50), citing *Maier v. Maretti*, 671 A.2d 701, 707 (Pa. Super. Ct. 1995), appeal denied, 694 A.2d 622 (Pa. 1997). An unintended beneficiary cannot recover for an alleged tortious interference with a contract under this standard.

Although PennEnergy claims MDS 2017-LP is the unintended beneficiary of the PSA, they acknowledge that the PSA itself intended for MDS 2017-LP to be an assignee. “MDS and Winfield executed a Purchase and Sale Agreement... that obligated MDS to assign that interest to an ‘MDS partnership developing said working interest’ and obligated that partnership to convey units in itself to Winfield in exchange.” (emphasis added) (Pet. to Vacate, *supra*, at P. 10, L. 71). This Court also finds that MDS 2017-LP was in fact an assignee, not an unintended beneficiary. The PSA further states, “(B)Purchaser (MDS) shall assign the Acquired Interests to the Limited Partnership (MDS 2017-LP) pursuant to a form of assignment instrument that is reasonably satisfactory to Seller...” (clarification added) (Id. at 351-52). This Court cannot fathom why PennEnergy is making this argument when the PSA is unambiguous regarding assignment and PennEnergy itself acknowledges that assignment in its Petition.

Furthermore, an assignee stands in the shoes of the assignor:

An assignment is a transfer of property or a right from one person to another; unless qualified, it extinguishes the assignor’s right to performance by the obligor and transfers that right to the assignee. *Legal Capital, LLC v. Medical Professional Liability Catastrophe Loss Fund*, 561 Pa. 336, 750 A.2d 299, 302 (2000)... An assignee’s rights, however, are not inferior to those of the assignor. *U.S. Steel Homes Credit Corporation v. South Shore Development Corporation*, 277 Pa. Super. 308, 419 A.2d 785, 789 (1980). Ultimately, an assignee stands in the shoes of the assignor. *Hedlund Manufacturing Company, Inc. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357, 358 (1988).

*Crawford Cent. Sch. Dist. v. Com.*, 585 Pa. 131, 136 (2005).

All rights the assignor possessed in the contract transfer to the assignee. Under this standard, an assignee would be able to sue a third party for tortious interference of a contract because the assignee assumes the rights and obligations of the assignor. PennEnergy has not provided any viable claim that the arbitrator exceeded his powers regarding his ruling.

Next, the fourth element in our standard to vacate an arbitration award is: “(iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party;...” 42 Pa.C.S.A. §7314 (a)(1)(iv).

PennEnergy does not argue that the arbitrator refused to postpone the hearing upon good cause shown. However, PennEnergy argues that the arbitrator refused to hear evidence by not allowing PennEnergy to conduct discovery into MDS 2017-LP, thereby prejudicing PennEnergy in the arbitration proceedings. Judge Arnot evaluated and rejected the discovery requests. (Winfield’s Brief In Opposition, *supra*, at 23). PennEnergy signed the JDA knowing and agreeing that an arbitrator may limit discovery. Judge Arnot ultimately rejected PennEnergy’s discovery requests, which is an action that all parties agreed was proper in the JDA.

Furthermore, this Court will reiterate that arbitration is not a formal judicial setting and arbitrators are not bound by the technical rules of civil procedure. The arbitrator was given power to limit or expand discovery and he did so. The limitations the arbitrator ruled on discovery were not improper.

Next, PennEnergy argues that there was no agreement to arbitrate with MDS 2017-LP; that lack of an existence of an agreement to arbitrate with a party renders the arbitration award invalid.

Winfield, in response, argues that PennEnergy is judicially estopped from bringing this issue, having successfully argued the opposite position in its “Brief in Opposition to MDS Energy Development, LLC’s Motion to Dismiss” in the arbitration case. (Id. at 21).

Further, under Pennsylvania law, when a party, such as MDS, claims a right or a benefit under an agreement even though it is not a signatory to that agreement, it may nevertheless be compelled to arbitrate a dispute, particularly where the facts of the matter are ‘inextricably intertwined,’ with claims already subject to arbitration.

(Id. at Ex. 1, P. 9-10), citing *Dodds v. Pulte Home Corp.*, 909 A.2d 348, 351-52 (Pa. Super. 2006) (compelling arbitration with non-signatory third party where there existed an “obvious close nexus between the non-signatories”).

Judge Arnot agreed with PennEnergy and denied MDS’s Motion to Dismiss. PennEnergy’s position in the arbitration case is the opposite of what they’re attempting to argue now. Because Judge Arnot agreed with and ruled in favor of PennEnergy regarding this issue, PennEnergy is judicially estopped from asserting the opposite position. “The doctrine of judicial estoppel bars a party from asserting a position that is inconsistent with a position that it previously successfully asserted in litigation.” (Id. at 21) citing, *In re Adoption of S.A.J.*, 838 A.2d 616, 620 (Pa. 2003).

Lastly, PennEnergy argues that Judge Arnot made the wrong ruling in the arbitration case, stating that a court would have dismissed the case, had it been litigated. PennEnergy attempted to support this claim by arguing that PennEnergy did not tortiously interfere with a contract, that it was instead a good faith dispute, along with their argument that MDS 2017-LP was an unintended beneficiary.

However, “the fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.” 42 Pa.C.S.A. §7314(a)(2).

Regardless of whether this Court would find the opposite ruling as Judge Arnot is not a sufficient basis for vacating an arbitration award. This Court will not vacate the arbitration award even if it would have not granted the award in the judicial system.

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#### IV. Conclusion

After careful review of all documents, arguments, and relevant caselaw regarding this matter, this Court cannot reach any other conclusion than to confirm the arbitration award and deny PennEnergy's Petition. PennEnergy has not met the high burden of proof needed to vacate an arbitration award. This Court denies PennEnergy's Petition to Vacate Arbitration Award with prejudice, thereby confirming the Arbitration Award of May 14, 2019 in AAA Case No.01-18-0001-1808. The Court also awards post-judgement interest to MDS running from the date of the Award, May 14, 2019.<sup>9</sup> An appropriate Order will follow.

BY THE COURT:

/s/The Hon. Philip A. Ignelzi

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<sup>1</sup> PennEnergy cites to the PSA in their Petition as Exhibit P. However, after extensive search for Exhibit P, the Court found that it was completely redacted in PennEnergy's Amended Petition to Vacate, ECF #8. This Court, however, did find the PSA in the "Petition to Vacate Arbitration Award," ECF #1, which contains no redactions, but is completely missing exhibit labels. The PSA, in this document, can be found at page 351 (out of a total of 569 pages) and labeled as Exhibit J-69.

<sup>2</sup> There is dispute between the parties about exactly when PennEnergy became aware of the existence of MDS 2017-LP and its role in events leading to arbitration. PennEnergy claims that this occurred upon production of the PSA during the arbitration discovery process. MDS claims that they do not know when PennEnergy became aware of MDS 2017-LP exactly, except that it was at least five months prior to the arbitration proceedings. (MDS Answer, supra, at P. 3, L. 12). This Court will recognize that PennEnergy became aware of MDS 2017-LP at the very least during discovery for the arbitration because PennEnergy sought to compel discovery into financial information on "the unnamed limited partnership," a fact that both parties agree on, as well as the production of the PSA. (Pet. to Vacate Arbitration Award, supra, at P. 14, L. 105); (MDS Answer, supra, at P. 3, L. 12).

<sup>3</sup> This is specifically from Paragraph 5 of the "Final Award" from the Arbitrator's Opinion dated May 14, 2019, AAA Case No. 01-18-0001-1808. The Arbitrator's Opinion immediately follows Petitioner's Petition to Vacate Arbitration Award found at ECF #1, starting at page 24.

<sup>4</sup> Petitioners do not wish to vacate all of the findings by the Arbitrator, only paragraph 5. Petitioners state that all other findings by the Arbitrator besides paragraph 5 can be confirmed. (Transcript of Proceedings on Petition to Vacate Arbitration Award at P. 50, L. 23 – P. 51, L. 4 & P. 62, L. 17-21, PennEnergy Resources, LLC v. Winfield Resources, LLC & MDS Energy Development, LLC, No. 19-008604 (Allegheny Cty. Ct. Com. Pl. December 17, 2021), ECF No. 62) ("Transcript").

<sup>5</sup> *Kopew v. Toll Brothers, Inc.* is an unpublished disposition and therefore, non-precedential. However, unpublished Superior Court decisions filed after May 1, 2019 may be cited for their persuasive authority. See 210 Pa. Code 65.37(A-B).

<sup>6</sup> Plaintiff cites the following in support of this claim: "Correctly identifying the real party in interest to a cause of action frames the case to come and is essential so a court may consider issues related to standing, see, e.g., *Lore v. Sobolevitch*, 675 A.2d 805, 808 (Pa. Cmwlth. Ct. 1996) (rejecting case on standing grounds because plaintiff was not real party in interest)."

<sup>7</sup> Again, the parties are in dispute as to when PennEnergy learned of MDS 2017-LP. We have determined above that PennEnergy at the very least became aware of MDS 2017-LP when they attempted to conduct discovery on the "limited partnership" before the arbitration proceedings began and the PSA was provided to PennEnergy, in which MDS 2017-LP is a named entity.

<sup>8</sup> The standard the Court in *Leechburg* bases this ruling on is 5 P.S. § 161, which was repealed in 1980. The subject matter of these repealed sections is now found in 42 Pa.C.S.A. § 7301, our standard of review. Act of Apr. 25, 1927, PA ST 5 P.S. § 161 repealed by 1980, Oct. 5, P.L. 693, No.142, § 501(c).

<sup>9</sup> "It is well-established that interest runs from the date the award of the arbitrators is entered." *Cotterman v. Allstate Ins. Co.*, 666 A.2d 695, 701 (Pa. Super. Ct. 1995). PennEnergy's counsel conceded at argument such an award of interest would be appropriate. Transcript, supra, at P. 49, L. 24 – P. 50, L. 13).