FSM SUPREME COURT APPELLATE DIVISION

NATIONAL GOVERNMENT OF THE FEDERATED STATES OF MICRONESIA, by and through its agency, the FSM Program Management Unit, Appellant, vs. PACIFIC INTERNATIONAL, INC., Appellee.	APPEAL CASE NO. P12-2021 (Civil Action No. 2014-046)

ORDER DENYING REHEARING PETITION AND RECUSAL MOTION

Decided: October 5, 2022

BEFORE:

Hon. Larry Wentworth, Associate Justice, FSM Supreme Court
Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court
Hon. Cyprian Manmaw, Specially Assigned Justice, FSM Supreme Court*

*Chief Justice, State Court of Yap, Colonia, Yap

APPEARANCE:

For the Appellee: Thomas M. Tarpley, Jr., Esq.
Thomas McKee Tarpley Law Firm
137 Murray Blvd., Suite 202
Hagatna, Guam 96913

* * * *

HEADNOTES

Appellate Review – Rehearing; Courts – Recusal – Bias or Partiality; Courts – Judicial Statements or Rulings

An appellate panel will not recuse itself on a petition for rehearing for allegedly being biased when it focused on an issue that the appellant had raised below, but had paid little attention to on appeal because an appellate panel's legal rulings, even though unfavorable, do not, and cannot, disqualify the panel members from an appeal. FSM v. Pacific Int'l, Inc., 23 FSM R. 665, 666 (App. 2022).

Appellate Review – Rehearing;

The appellate court may grant a petition for rehearing only if it has overlooked or misapprehended either a point of law or fact. Ordinarily, petitions for rehearing are summarily denied, but, when clarification may be helpful, some reasons may be given. FSM v. Pacific Int'l, Inc., 23 FSM R. 665, 666 (App. 2022).

Appellate Review – Standard – Civil Cases – Plain Error

The plain error doctrine has been used in civil appeals. FSM v. Pacific Int'l, Inc., 23 FSM R. 665, 666 (App. 2022).

Arbitration

If the right to arbitration survives an invalid agreement through waiver or otherwise, then the arbitration limits survive. They are inseparable. This is not a finding of fact. It is a conclusion of law. FSM v. Pacific Int'l, Inc., 23 FSM R. 665, 666 (App. 2022).

Appellate Review – Standard – Civil Cases – Factual Findings

The FSM Supreme Court appellate division does not engage in fact-finding. FSM v. Pacific Int'l, Inc., 23 FSM R. 665, 666 (App. 2022).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

Our opinion and the judgment in this matter were entered on August 30, 2022. FSM v. Pacific Int'l, Inc., 23 FSM R. 638 (App. 2022). On September 13, 2022, the appellee, Pacific International, Inc. ("PII"), filed its Petition for Rehearing, with Motion for Recusal, in which it asks that we recuse ourselves and that an entirely new appellate panel grant a rehearing of the part of our decision that was unfavorable to PII.

PII contends that we have shown an impermissible bias against it when we focused on an issue that the appellant FSM had raised below, Defendant's Response to Motion to Enter Judgment on AAA Award and Motion to Reduce Liability at 3-5 (May 1, 2020), but had paid little attention to on appeal (the high-low arbitration limits), Appellant's Br. at 25-26, and that therefore we should all recuse ourselves and an entirely new appellate panel should consider and grant its rehearing petition. We deny the recusal motion. An appellate panel's legal rulings, even though unfavorable, do not, and cannot, disqualify the panel members from an appeal. *Cf.* Setik v. Perman, 22 FSM R. 105, 111 (App. 2018) (unfavorable legal rulings in two earlier appeals from the same case could not disqualify the panel members on those appeals from the panel on a later, closely-related appeal).

We now turn to the rehearing petition. We may grant a petition for rehearing only if we have overlooked or misapprehended either a point of law or fact. Setik v. Mendiola, 21 FSM R. 624, 625 (App. 2018). Ordinarily, petitions for rehearing are summarily denied, but, when clarification may be helpful, some reasons may be given. Iriarte v. Individual Assurance Co., 18 FSM R. 406, 408 (App. 2012). A short statement may be helpful here.

PII contends that we have misapprehended whether the high-low arbitration limits was a matter before us. PII also contends that, by focusing on the high-low arbitration limits, we have advocated for a party and that somehow we considered evidence that was not part of the record and that we therefore engaged in fact-finding when we ruled that "the type of arbitration to which [the FSM] waived its objection was a high-low arbitration." Pacific Int'l, Inc., 23 FSM R. at 646. PII further contends that we erred by applying the plain error doctrine to a civil case.

We have previously applied the plain error doctrine in civil appeals, *e.g.*, Panuelo v. Amayo, 12 FSM R. 365, 372 (App. 2004), considered whether there was plain error in other appeals but found none, *e.g.*, Anton v. Cornelius, 12 FSM R. 280, 284-85 (App. 2003); Hartman v. Bank of Guam, 10 FSM R. 89, 95 (App. 2001), and noted its existence without applying it in other civil appeals, *e.g.*, Berman v. Pohnpei, 17 FSM R. 360, 367 (App. 2011); Palsis v. Kosrae, 17 FSM R. 236, 241 n.2 (App. 2010).

If the right to arbitration survived the invalid agreement through waiver or otherwise, then the arbitration limits survive. They were inseparable. This was not a finding of fact. It was a conclusion of law. The FSM Supreme Court appellate division does not engage in fact-finding. Edmond v. FSM Dev. Bank, 22 FSM R. 77, 80 (App. 2018); In re Sanction of George, 17 FSM R. 613, 616 (App. 2011); Goya v. Ramp,

14 FSM R. 305, 307 n.1 (App. 2006).

Accordingly, we have carefully reviewed PII's petition for rehearing and we determine that we have neither overlooked nor misapprehended a material point of law or fact. The petition is denied.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM TELECOMMUNICATIONS CABLE CORPORATION (the Open Access Entity),	)	CIVIL ACTION NO. 2021-010
Plaintiff-Counter-Defendant,	)	
vs.	)	
FSM TELECOMMUNICATIONS CORPORATION,	)	
Defendant-Counterclaimant.	)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Larry Wentworth
Associate Justice

Hearing: May 12, 2022
Decided: October 25, 2022

APPEARANCES:

For the Plaintiff: Aaron L. Warren, Esq.
Mooney Wieland PLLC
P.O. Box 3501
Pago Pago, American Samoa 96799

For the Defendant: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Telecommunications

A public law removed FSM Telecommunications Corporation's monopoly status when its power to operate as the sole provider of all telecommunications services, except radio and television broadcasting, within the FSM and between points in the FSM and points outside thereof was changed to the power to operate as a provider of all telecommunications services within the FSM and between points in the FSM and points outside thereof. FSM Telecomm. Cable Corp. v. FSM Telecomm. Corp., 23 FSM R. 667, 674 & n.2 (Pon. 2022).