

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 10, 2002 Session

JAMES H. SMITH, ET UX. v. JOE E. HUKOWICZ, ET AL.

**Interlocutory Appeal from the Circuit Court for Sumner County
No. 18141-C; The Honorable C. L. Rogers, Judge**

No. M2001-01320-COA-R9-CV - Filed January 16, 2003

This is an interlocutory appeal from the trial court's order to partially vacate an arbitration award. The arbitration was the result of a dispute between the purchasers of a home, the Smiths, the builder, Mr. Hukowicz, and the owner of the home, Mr. Herring. The dispute arose over who was liable for the numerous problems the Smiths encountered after closing on the home. The Arbitrator determined that, although Mr. Herring and Mr. Hukowicz were partners in a joint venture to build and sell the house, only Mr. Hukowicz was liable to the Smiths for the problems with the house by virtue of the Builder's Limited Warranty that the parties had signed. The trial court vacated this portion of the arbitration award and ordered a new trial on the issue of Mr. Herring's liability. For the reasons below, we reverse.

Tenn. R. App. P. 9, Interlocutory Appeal; Judgment of the Circuit Court Reversed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY KIRBY LILLARD, J., joined.

M. Taylor Harris, Jr., Nashville, TN, for Appellant

Michael W. Edwards, Hendersonville, TN, for Appellees

OPINION

Facts and Procedural History

This case arises from problems that occurred in the construction of a home. The Appellant, William W. Herring ("Mr. Herring") became acquainted with Joe E. Hukowicz ("Mr. Hukowicz") through Mr. Herring's position as a loan officer at a bank. Mr. Herring was impressed with the work Mr. Hukowicz was doing on a home he was building for himself, and later Mr. Herring and Mr. Hukowicz agreed that Mr. Hukowicz would build a house for Mr. Herring and his wife. Mr. Herring put up the money for the lot and construction costs while Mr. Hukowicz oversaw the construction. Although he had much experience as a project manager in commercial construction, Mr.

Hukowicz's own home was the first he had built as a general contractor and he was building the Herring's home in order to gain experience as he started his own construction business. As construction progressed, the Herrings decided that they wanted to sell the home rather than live in it because a move would cause additional drive time to their workplaces. At this point, the home was approximately forty percent complete. The Herrings and Mr. Hukowicz agreed that they would complete the house and that they would split any profits from the sale of the home. The home was put up for sale and James H. Smith and Janie M. Smith ("The Smiths") bought the house. The contract for the sale of the home provided that the Herrings would not be liable for the condition of the home after the closing but that Mr. Hukowicz, as the builder, would give the Smiths a one year warranty. Mr. Hukowicz and the Smiths signed a lengthy "Builder's Limited Warranty" agreement at the closing. The Smiths' problems with the home began immediately. In the course of closing on the home and in the next few months afterward, they prepared three different "punch lists," or lists of problems with the home, for Mr. Hukowicz to repair. The Smiths became quite upset over what they viewed as the continuing non-resolution of the problems. After a very heated phone call between Mr. Smith and Mr. Hukowicz, Mr. Hukowicz called Mr. Herring to step in, calm the situation down, and find an acceptable compromise. The parties decided that the Smiths should take the second punch list to a third party and that they would be reimbursed for doing so. After these problems and approximately three months before the expiration of the Builder's Limited Warranty, the Smiths created a new a list of faults. Mr. Hukowicz was not given the list before the expiration of the warranty.

On April 21, 1998, the Smiths filed a complaint against Mr. Hukowicz, American Builders, and Mr. Herring in the Circuit Court of Sumner County, alleging negligence, breach of contract, and breach of warranty for failing to construct the Smiths' home in a workmanlike manner. The Smiths filed an amended complaint to assert the remedy of rescission of the contract. The amended complaint also alleged that Mr. Hukowicz and Mr. Herring violated the Tennessee Consumer Protection Act by fraudulently not disclosing their failure to have a contractor's license.

Mr. Hukowicz and Mr. Herring filed a motion to compel arbitration pursuant to the arbitration clause of the Builder's Limited Warranty. The Smiths opposed the motion to compel arbitration, but the trial court granted the motion and ordered arbitration. The trial court granted the Smiths' motion for permission for an interlocutory appeal on this ruling, but this Court denied the application for permission to appeal. Mr. Herring filed a motion for summary judgment in which he argued that he was not a partner with Mr. Hukowicz in constructing the Smiths' home. The Smiths opposed Mr. Herring's motion for summary judgment, arguing that Mr. Herring was a partner with Mr. Hukowicz in constructing their home. The trial court denied Mr. Herring's motion for summary judgment. The parties next went through an unsuccessful mediation followed by the arbitration that is the subject of the present case.

James D. Kay, Jr. ("the Arbitrator") conducted arbitration between the parties. The Arbitrator awarded the Smiths a judgment in the amount of \$25,600.00 against Mr. Hukowicz, individually and d/b/a American Builders. The Arbitrator found that Mr. Herring was a partner with Mr. Hukowicz in constructing the Smiths' home. Nevertheless, the Arbitrator dismissed the claims against Mr.

Herring, finding that the Builder's Limited Warranty in conjunction with the contract for the sale of the home precluded all claims against Mr. Herring.

The Smiths filed a motion to vacate the arbitration award on the following grounds: (1) the Arbitrator incorrectly omitted Mr. Herring from the arbitration award; (2) the parties had no arbitration agreement in accordance with section 29-5-313 of the Tennessee Code; (3) the arbitration agreement was invalid and unenforceable because it was not initialed by the Smiths in accordance with section 29-5-302(a) of the Tennessee Code; and (4) the Smiths should not have been forced to arbitrate because they sought rescission of the contract based on fraud in the procurement of the contract by Mr. Hukowicz and Mr. Herring. The trial court ordered an evidentiary hearing to determine whether fraud existed in this case to warrant setting aside the arbitration agreement. Following the hearing, the trial court found no fraud on the part of Mr. Hukowicz and Mr. Herring and found that the case was properly sent to arbitration.

The trial court confirmed the amount of the arbitration award but found that the portion of the award which dismissed the claims against Mr. Herring was beyond the scope of the arbitration agreement. The trial court vacated this portion of the arbitration award. The trial court ordered a new trial on the Smiths' claim that Mr. Herring should be jointly liable with Mr. Hukowicz on the breach of warranty arbitration judgment. Mr. Herring filed a motion to alter or amend this order. The trial court denied Mr. Herring's motion to alter or amend, but granted an interlocutory appeal to Mr. Herring which was then accepted by this Court.

The parties present the following issues, as we perceive them, for our review:

- I. Whether the trial court erred in vacating the portion of the arbitration award that found that Mr. Hukowicz was solely liable to the Smiths and dismissed all claims against Mr. Herring.
- II. Whether the trial court erred in not completely vacating the arbitration award on the grounds that there was no arbitration agreement.

Standard of Review

Our standard of review of a trial court's decision in an arbitration case is the "clearly erroneous" standard for findings of fact. *Warbington Construction, Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 856 (Tenn. Ct. App. 2001) (citing *Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W.2d 445, 449 (Tenn. 1996)). "Matters of law, if not able to be resolved by resort to the controlling statutes, should be considered independently, with the utmost caution, and in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." *Id.* (quoting *Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W.2d 445, 450 (Tenn. 1996)). Under such a deferential standard of review, the merits of an arbitration award will not be considered. *Id.*

Law and Analysis

I. Whether the Trial Court Erred in Vacating the Portion of the Arbitration Award that Dismissed the Claims Against Mr. Herring.

As an initial matter, we must first resolve which arbitration agreement was partially vacated and on what grounds. Tennessee Code Annotated § 29-5-313 delineates the circumstances in which a court may vacate an arbitrator's decision. *See Arnold v Morgan Keegan & Co., Inc.*, 914 S.W.2d 445, 450 (Tenn. 1996). This section reads:

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

- (1) The award was procured by corruption, fraud or other undue means;
- (2) 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;
- (3) The arbitrators exceeded their powers;
- (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or
- (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.

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

Tennessee Code Annotated § 29-5-313(a) (2000).

In the present case, the trial court found that the arbitrator went “beyond the scope of the contract arbitration.” This ruling falls under section (3) of the above statute in that when arbitrators go beyond the scope of the agreement, the arbitrators have “exceeded their powers.” *Arnold*, 914 S.W.2d at 450. The trial judge found that the Arbitrator's decision that Mr. Herring was not liable to the Smiths “attempts to arbitrate and resolve legal relationships and ultimate legal liability between the parties The Court finds that the attorney for the Plaintiffs did not voluntarily consent to expanding the scope of the contract arbitration.”

Appellant, Mr. Herring, argues that the trial court mistakenly based its ruling on the first order to compel arbitration under the arbitration clause contained in the Limited Builder's Warranty. Mr. Herring contends that the arbitration the parties entered into came about under a completely

different arbitration agreement that was proposed by the Smiths. Appellees, the Smiths, contend that they were under an order to arbitrate the dispute based on the Limited Builder's Warranty, but that the parties had first tried mediation. The Smiths argue that when mediation failed, they moved the trial court to forego any further attempts at mediation and proceed with the ordered arbitration.

The record reflects that the original trial judge in the case found the parties were compelled to arbitrate under their agreement in the Limited Builder's Warranty. The parties proceeded to mediation which failed. Subsequently, the Smiths moved the court to "order that the present lawsuit be set for arbitration." In this motion the Smiths argued that the case had been languishing for almost two years, and that the "Court should order that this case be arbitrated rather than mediated because of the length of time this case has been pending with no resolution." An agreed order was entered some three weeks later which stated "upon agreement of the parties . . . that the above referenced case bypass mediation and be set directly for arbitration."

As stated above, Mr. Herring's position is that this agreed order created a new arbitration agreement. We cannot agree. It is highly unlikely that the Smiths who have contested this case being set for arbitration at each and every step of the proceedings would suddenly turn about 180 degrees and create a new arbitration agreement to settle the case.¹ We find that there was no new arbitration agreement and that the parties were proceeding under the original order to arbitrate pursuant to the Builder's Limited Warranty.

Having discovered which arbitration agreement was partially vacated, we next review the decision to vacate. As stated above, the trial court found that the decision of the Arbitrator to hold Mr. Hukowicz liable to the Smiths, but not Mr. Herring, exceeded the powers of the Arbitrator because it was an "attempt[] to arbitrate and resolve legal relationships and ultimate legal liability between the parties"

At the closing on the home, the Smiths and Mr. Hukowicz signed a document captioned "Builder's Limited Warranty." In that document is a clause that has repeatedly been held by the lower court to bind the parties to arbitration over disputes arising under that warranty. We find no error in these holdings. The Smiths' Arbitration Statement submitted to the Arbitrator states that Mr. Herring and Mr. Hukowicz were "acting in conjunction" and calls Mr. Herring and Mr. Hukowicz's relationship a "joint venture [in which] Herring acted as the realtor . . . and Hukowicz was the builder." The Smiths' submitted to the Arbitrator that "Herring and Hukowicz, d/b/a American Builders . . . should be liable for all of the above mentioned damages." The Arbitrator disagreed with this assertion and found that while Mr. Herring and Mr. Hukowicz were indeed partners in a joint venture to build and sell this house, they had contracted with the Smiths to assign liability for defects in the home to Mr. Hukowicz. The Arbitrator pointed to the contract for the sale of the home between the Smiths and Mr. Herring which in several places disavows that any warranty was being given by the Herrings and specifically states that it was the builder (i.e. Mr. Hukowicz) giving the

¹ We note the Smiths again raise the validity of the arbitration clause on this appeal.

warranty. The Arbitrator noted that the Smiths then signed an extensive warranty agreement with Mr. Hukowicz

While reviewing this decision of the Arbitrator, the trial court made comments that give insight into the reasoning used in making its decision to vacate this part of the arbitration award. The trial court stated:

How do we separate these two men that sit here, under oath, and say that they're partners, say that we want to take this Builder's Limited Warranty, and only impose it against one of the partners and the other partner gets to walk away. I don't care who does that, that don't [sic] sound right.

Our Supreme Court has instructed that a trial court must accord deference to an arbitrator's award and that once entered "the finality that courts should afford the arbitration process weighs heavily in favor of the award." *Arnold v. Morgan Keegan & Co., Inc.* 914 S.W.2d 445, 448 (Tenn. 1996) (citation omitted). The *Arnold* Court further instructed that "[a]s long as the arbitrator is, arguably, construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 449. Finally, and most appropriate to this case, we think, the *Arnold* court stated that "a trial court may not vacate an award simply because it disagrees with the results." *Id.* at 448.

The issue before the Arbitrator was whether or not the various claims of damages the Smiths claimed on their home fell under the Builder's Limited Warranty, and if so who was to pay for them. The Smiths alleged that both Mr. Herring and Mr. Hukowicz were liable for the damages to the home. The Arbitrator heard the evidence presented to him and decided that the damages did fall under the Builder's Limited Warranty and that only Mr. Hukowicz was liable for that warranty. We hold, therefore, that the Arbitrator was acting within the scope of the Builder's Limited Warranty when he decided what damages were appropriate under it and who was responsible for those damages. Thus, we find that it was error for the trial court to partially vacate this decision and must reinstate the original Arbitrator's award.

II. Whether the trial court erred in not completely vacating the arbitration award on the grounds that there was no arbitration agreement.

The Smiths state in their brief that they are raising a "new issue . . . which is appealable as of right pursuant to T.C.A. § 29-5-319." This section of the Tennessee Code states in pertinent part: "(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." This section "creates a rare exception to the general rule that a party is not entitled to appeal a judgment or order . . . unless that order or judgment is a final one." *Samson v. Hartsville Hospital, Inc.*, No. 01-A-01-9609-CH-00430, 1997 Tenn. App. LEXIS 172, at *6 (Tenn. Ct. App. March 12, 1997). This exception, however, does not bring this issue within the scope of the current appeal.

This is an interlocutory appeal granted under Rule 9 of the Tennessee Rules of Appellate Procedure. As such, the scope of issues that may be raised differs from an appeal as of right under Rule 3. *Heatherly v. Merrimack Mutal Fire Insurance Co.*, 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000). In a Rule 3 appeal, both parties have “broad latitude with regard to the issues they can raise,” subject to Rules 3(e) and 13(b). *Id.* Such latitude does not exist in a Rule 9 appeal where “the only issues that can be raised are those certified in the trial court’s order granting permission to seek an interlocutory appeal and in the appellate court’s order granting the interlocutory appeal.” *Id.*

In the present case the trial court’s order entered May 25, 2001 states “Defendant Herring’s motion to alter or amend the April 23, 2001 Order against him is denied. Said Defendant is hereby granted an interlocutory appeal of this ruling.” The Order of this Court granting Mr. Herring’s application states the application is “from an order . . . vacating the portion of an arbitration decision which dismissed the plaintiffs’ action against him.” No mention is made of the issue Appellees, the Smiths, raise here. For these reasons, we decline to address this issue.

Conclusion

For the reasons stated above, we reverse the trial court’s decision to partially vacate the arbitration award and reinstate the original arbitration award. We decline to address the Appellees’ “new” issue as it is not properly before this Court on this interlocutory appeal pursuant to Rule 9 of the T.R.A.P. We further decline to address the issue raised by Appellees concerning sanctions against Appellant’s counsel for statements made in his brief. We deny Appellant’s request for post-arbitration costs. Cost of this appeal are taxed to Appellees.

ALAN E. HIGHERS, JUDGE