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IN THE SUPREME COURT OF THE STATE OF UTAH

ALLSTATE INSURANCE COMPANY,

Respondent,

v.

DIXON WONG,

Petitioner.

Supreme Court Case No. 20040670-SC

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SUMMARY OF ARGUMENT

Parties to arbitration control the scope of matters submitted in arbitration. Parties express their intentions regarding the scope of submission in their written agreement to arbitrate. When an insurer and an insured submit an issue to arbitration, policy limits may play one of two roles in the arbitration. First, if the parties either specifically agree to limit the scope of the arbitration to the policy limits, or agree not to disclose those policy limits to the arbitrator, policy limits may limit the scope of submission to an arbitrator.

Second, if the parties neither mention policy limits in their arbitration agreement nor agree to withhold policy limits from the arbitrator, policy limits become an affirmative defense for the insurer. In this second scenario, the parties submit the entire issue of contractual obligation, including contractual limitations on liability, to the arbitrator. If the insurer fails to argue its affirmative defense in arbitration, it may not reassert its defense in an attempt to modify the award in court.

Wong and Allstate submitted an issue to arbitration: the extent and nature of Allstate's contractual obligation to pay Wong's underinsured damages. In their Arbitration Agreement, there was no mention of policy limits limiting an available award, and the parties were not forbidden from disclosing those policy limits to the arbitrator. Allstate did submit two items of set-off to the

arbitrator, the No-Fault PIP benefits paid, and the third-party recovery amount. There was no apparent reason why it could not have submitted the policy limits to the arbitrator as an affirmative defense to any award exceeding those limits. By failing to do so, Allstate exposed itself to the risk that the arbitrator's assessment of its obligation might exceed those policy limits.

ARGUMENT

1. Wong's Brief Addresses The Issue That Certiorari Was Granted On

Allstate makes a big show of arguing that Wong has abandoned the arguments he made in the petition for certiorari and before the Utah Court of Appeals. Actually, Wong was faithfully following the formulation of the issue upon which certiorari was granted. It is true that, ordinarily, the issues on certiorari are those in the Court of Appeals opinion and the petition for certiorari. *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856 (Utah 1998). However, where the Utah Supreme Court specifically sets forth the question upon which certiorari will be granted, the parties are not free to brief a different, potentially more friendly issue. *Taylor v. Ogden City School District*, 927 P.2d 159 (Utah 1996)(briefing limited to specific issue). The order granting certiorari itself cleary stated that review "is granted only as to the following issue: Whether the net amount to be paid for the underinsured damages of the petitioner, insofar as those damages potentially exceeded the policy limits, was a matter submitted to the arbitrator by the parties' arbitration agreement". No other issue was to be briefed.

Perhaps Allstate did not notice the issue as phrased by this Court. But as a result, Allstate's brief is unhelpful because it fails to focus on the precise issue before the Court. In any event, Wong did not waive or abandon his appeal by his Petitioner's brief; instead, he limited his analysis and argument to the issue presented to him by the Supreme Court, word for word as it was phrased for the parties. That issue is solely the intent of the parties as they submitted the claim to arbitration.

2. The Arbitration Agreement Was Intended To Cover The Total Amount Due Wong

The Arbitration Agreement of March 21, 2002, specifically stated that "the parties will thereafter be bound by the decision of the arbitrator . . .". (R. 47). The "decision of the arbitrator" was the award of $260,926.84. The parties apparently intended the arbitrator to calculate the "net" amount of the award, "net" of any set-off or limitation, because the arbitrator was provided evidence of the third-party recovery and the No-Fault payments. The arbitrator then "netted out" or subtracted these amounts in calculating his award. One can conclude from what the parties and the arbitrator actually did, that the arbitrator was to finally resolve the dispute by making an award of "the net amount to be paid".

The parties did not draft an agreement that limited the arbitrator to assessing the amount of damages to Wong, from which the parties would make their own subtractions. If they had intended to do that, they would presumably have said so, and not submitted any set-off or limitations to the arbitrator. In other words, if that was their intent, they would not have advised the arbitrator of the third-party recovery amount, and the No-Fault amounts, and assented to subtraction of those

amounts. Further, they would not have "lined out" the high-low provision that tracked the policy limits of $100,000.00.

3. The Arbitration Agreement Was Substantive, Not Procedural.

Allstate essentially abandons the Arbitration Agreement which formed the basis for the arbitration. The detailed, multi-paragraph agreement is now characterized by Allstate as "procedural", and, presumably, of no "substance". (Allstate Brief, p. 16). This is hard to understand. Written agreements knowingly signed by an insurer and insured are generally understood to be very substantive and binding. Any number of insureds have been turned out of court due to written agreements that were considered by the courts to be very substantive, and not at all procedural.

4. The Arbitration Agreement Did Not Need To Be Submitted To The Arbitrator.

Allstate also now takes the position that the Arbitration Agreement was not binding because it was never submitted to the arbitrator. (Allstate Brief, p. 16-18). However, the scope of the arbitration is determined by the agreement between the parties. The last expression of the agreement between the parties was the Arbitration Agreement.

Actually, Allstate's argument here is Wong's argument - that an agreement not disclosed to the arbitrator cannot limit the arbitrator's award. By arguing that the Arbitration Agreement needed to be disclosed to the arbitrator for him to understand the scope of the submission, Allstate concedes the corollary: that the insurance policy needed to be disclosed to the arbitrator for him to limit the scope of his award. If Allstate wanted the arbitrator to limit the scope of the arbitration agreement

to policy limits, it should have submitted those policy limits to the arbitrator. It did not do this. Instead, it submitted the entire controversy to the arbitrator.

5. The Driggs Agreement Was Only An Agreement To Hire Driggs.

Allstate again relies upon the document that the parties used to hire Warren Driggs as the arbitrator to define the scope of the arbitration ("Driggs document"). The Driggs document patently makes no reference to the prior Arbitration Agreement. It does not incorporate the policy by reference (which was, of course, already superceded by the Arbitration Agreement). It does not even purport to define the scope of the arbitration. It merely identifies the "nature of dispute" in a short-hand way. The "nature" of the dispute as written by Driggs (not the parties!) cannot reasonably be understood to define the scope of the arbitration, especially in light of the detailed Arbitration Agreement already executed by the parties.

On the other hand, if the Court relies upon the Driggs document to be the substantive expression of the parties' intent, the result, again, should be an affirmance of the abritrator's award. The Driggs document sets forth no limits on the award of the arbitrator.

6. The Insurance Policy Was Not Incorporated Into The Arbitration Agreement.

Allstate argues repeatedly to the effect that everyone "understood" that the Arbitration Agreement would be limited by the original insurance policy. (Allstate Brief, p. 29). This "understanding", so passionately expressed by counsel, was not expressed in the Arbitration Agreement or brought before the arbitrator.

As a practical matter, most arbitrations arise out of some pre-existing contractual arrangement, typically between businesses. If the arbitration agreement is implicitly modified by the original agreement between the parties, then any unsuccessful arbitrating party can attack the award on the ground that it somehow did not conform to the original contractual agreement. The only feasible policy is one that focuses solely on the intent of the parties, as expressed in the arbitration agreement, not by reference to the original contract between the parties. See e.g., *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 299 (Utah 1980); *Sparrow v. Tayco Construction Co.*, 846 P.2d 1323 (Utah App. 1993)(error to construe five separate, unrelated documents as a single, integrated contract; only two documents formed parties' contract).

7. There Was A Good Reason To Resolve The Entire Matter Without Reference To Policy Limits.

Allstate has claimed that Wong wants something he never bargained for. Essentially, it argues that there was no consideration for the Arbitration Agreement. (Allstate Brief, p. 29). This is wrong. Wong gave up a very valuable potential claim in exchange for the arbitration agreement. Wong gave up his extra-contractual claims in exchange for an arbitration proceeding, un-fettered by policy limits, but without including extra-contractual damages. This was an extra, and substantial consideration for his concession. As it stood, when the parties entered into the Arbitration Agreement, there was an exchange of consideration that included each party giving up the right to pursue legal remedies in the courts, in exchange for the arbitration proceeding as it was set forth. See

Aquagen Int'l, Inc. v. Calrae Trust, 972 P. 2d 411 (Utah 1998)(discussion of consideration at formation of contract); *Coulter & Smith, Ltd.*, at 859, 860 (consideration may consist of mutual exchange of promises).

The courts do not generally inquire into the adequacy of the consideration of a contract:

> With a few exceptions, it is still axiomatic in contract law that "[p]ersons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain." Biesinger v. Behunin, Utah, 584 P.2d 801, 803 (1978). Parties "should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." Carlson v. Hamilton, 8 Utah 2d 272, 275, 332 P.2d 989, 991 (1958). Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable. Of course, this general principle has its limits. An established exception is that if a contract is unconscionable, in whole or in part, the court may, on equitable grounds, refuse to enforce the unconscionable provisions, or it may construe the contract to avoid an unconscionable result. E.g., Biesinger v. Behunin, supra, 584 P.2d at 803; Russell v. Park City Utah Corp., Utah, 548 P.2d 889, 891 (1976); Carlson v. Hamilton, supra, 8 Utah 2d at 275, 332 P.2d at 991. See also 5 Corbin on Contracts §§ 1057, 1063, 1075 (1964); Note, 72 Yale L.J. 723 (1963).

Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983).

Wong felt that he had been treated badly by Allstate, his own insurance company. The actual settlement offers made by Allstate paled in comparison to the award of the arbitrator. Wong felt that Allstate had no reason to force him to arbitrate his claim, given that his damages clearly exceeded the policy limits. Wong clearly felt he had a case for bad faith claim. However, by signing the arbitration agreement, he waived any right he had to pursue any additional claims. Allstate appears to have felt that, if the award was less than policy limits, they would be insulated from a bad faith

claim, and that, if the award exceeded those limits, their exposure would be limited to just the amount of the award, without further exposure to consequential damages and attorney fees. Fairness dictates that Allstate be held to their bargain.

Allstate also postures itself as the victim of a trap. However, the trap, if there was one, was sprung in full view of Allstate, before the arbitration ever took place. Wong's lawyer laid it out explicitly before the arbitration; Allstate chose to proceed anyway, knowing full well what Wong's position was regarding the scope of the arbitration. See *Phoenix Indem. Ins. Co. v. Bell*, 896 P.2d 32 (Utah App. 1995)(insurer proceeded to issue policy despite notice of dishonored check from insured; no failure of consideration).

If Allstate is let out of the full arbitration award, then Wong should not be denied his remedy for extra-contractual damages. *U.S.A.A. v. Miller*, 44 P.3d 663; 2002 UT 6 (contractual appraisal provision did not bar suit for extra-contractual damages).

CONCLUSION

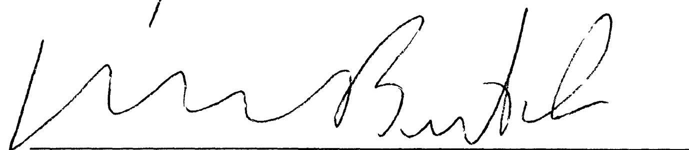
The arbitration award in this case should be enforced against Allstate. In the absence of limiting language in the Arbitration Agreement itself, the arbitrator's award completely resolved all the parties' rights under the insurance contract. The arbitrator's net award, including the damages that may have exceeded the policy limits, was within the scope of submission, as determined by the parties' Arbitration Agreement. Allstate failed in the arbitration to present its affirmative defense of

policy limits to its contractual liability. Allstate thus waived this defense and has no remedy against enforcement of the arbitration award.

The other documents signed by the parties were not part of the arbitration agreement. The policy predated the dispute, and was issued some significant time earlier. The Driggs document was only a memorial of the parties' desire to hire Driggs as the arbitrator. It was not an arbitration agreement. And in the arbitration, because Allstate failed to present evidence of any contractual limitation, such as policy limits, on its liability to Wong, the arbitrator could not rely on any policy limits to limit his award.

The trial court and Court of Appeals erred in modifying the award because they relied on an insurance contract that was extraneous to the Arbitration Agreement. Further, they mis-characterized the Driggs document as the final arbitration agreement. They failed to give effect to Allstate's failure to introduce the policy before the arbitrator, as it did the third-party recovery and the PIP payments. They did not recognize that Wong gave a valuable consideration for the agreement. This Court should reverse, and order enforcement of the arbitration award without modification.

RESPECTFULLY SUBMITTED, this 9 day of May, 2005.



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CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of May, 2005, a true and correct copy of the foregoing Petitioner's REPLY BRIEF was mailed by U.S. Mail, first-class postage prepaid, as follows:

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