STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1264

In re the Arbitration of:
Cincinnati Insurance Company,
Respondent,

vs.

Tyco Fire Products, f/k/a Central Sprinkler Company,
Appellant.

Filed May 1, 2007
Affirmed
Stoneburner, Judge

Washington County District Court
File No. 82C806001071

Bryan B. Carroll, Rolf E. Sonnesyn, Tomsche, Sonnesyn & Tomsche, P.A., 610 Ottawa Avenue North, Minneapolis, MN 55422 (for respondent)

Mark R. Whitmore, Susan E. Gustad, Bassford Remele, P.A., Suite 3800, 33 South Sixth Street, Minneapolis, MN; and

Jeff R. Scurlock, Shook, Hardy & Bacon, L.L.P., 2555 Grand Boulevard, Kansas City, MO 64108-2613 (for appellants)

Considered and decided by Stoneburner, Presiding Judge, Shumaker, Judge, and Crippen, Judge.*

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant asserts that the district court erred by vacating an arbitration award on the basis that it was procured by undue means. Because the record supports a determination that the exclusion of respondent from the arbitration proceeding was procured by undue means, and because the manner in which this arbitration proceeded violated the due-process provisions of the Arbitration Act, substantially prejudicing respondent, we affirm.

FACTS

Respondent Cincinnati Insurance Company (Cincinnati) brought a subrogation action against appellant Tyco Fire Products f/k/a Central Sprinkler Company (Tyco), alleging that Tyco negligently designed, manufactured, and installed a sprinkling system that malfunctioned causing property damage to Cincinnati's insured in the amount of $28,287.17. Cincinnati and Tyco agreed to submit the matter to binding arbitration by Arbitration Forums, Inc. (AF), a private organization. Cincinnati and Tyco agreed to have the case argued before a panel appointed by AF, and that all expert testimony would be submitted to the panel by report rather than live testimony. Because only Tyco belonged to AF regarding property damage claims, both parties had to provide AF with consent to proceed in that forum.

AF's rules provide that an "[a]pplicant commences an arbitration proceeding by filing a completed P-Form and Contentions Sheet with AF and the representative of each involved party being filed against." The rules provide for amendments to the initiating

documents, to be filed ten days prior to the hearing.

AF's P-Form contains a section titled "APPLICANT INFORMATION and ALLEGATIONS" which is divided into two columns. The second column under this title contains five small boxes followed by statements. Relevant to this appeal, one box is followed by "I request Notice of Hearing (Rule 3-1)," and another is followed by "This file will be represented in person (Rule 3-7)." Rule 3-1 provides that "AF will transmit or mail Hearing Notices to all parties at least 30 days prior to the initial hearing date, unless waived." Rule 3-7 provides that to present witnesses or attend an arbitration hearing, a party must indicate such intent on the original or an amended P-Form.

Cincinnati submitted its consent to arbitrate in AF's forum to AF by letter dated June 28, 2005, enclosing a copy of the P-Form, Contentions Sheet, and Cincinnati's exhibits. The letter notified AF where to send all correspondence and informed AF that the original P-Form had been forwarded to Tyco for review, with a request that Tyco return it to Cincinnati for filing with AF. Tyco was given a copy of the letter and attachments and was provided with a self-addressed, stamped envelope in which to return the original P-Form to Cincinnati. Information was filled out on the P-Form in type, but the notice and attendance boxes were x'd by hand, and the document was signed and dated by hand.

AF returned all of the documents to Cincinnati with a note indicating that the materials had to include Tyco's consent. Tyco provided consent in a letter dated July 21, 2005, addressed to counsel for Cincinnati. By cover letter to AF dated July 22, 2005, Cincinnati enclosed Tyco's consent, a copy of the P-Form, Contentions Sheet, and

Cincinnati's exhibits. The cover letter again informed AF where to send all correspondence and stated:

> The original Property Form (P-Form) has already been sent to counsel of record for the Respondent under separate cover for review and completion of the allegations section and any necessary amendments. I expect Respondent's counsel will return the original Property Form (P-Form) to me in the near future. I will file the original form upon receipt.

The P-Form sent to AF with the July 22, 2005, letter is identical to the P-Form sent with the June 28, 2005 letter except it does not contain any of the hand-written information that was on the first form. There are no x's in the notice and attendance boxes, and there is no signature or date. The July 22, 2005 cover letter was copied to Tyco, but it is not clear from the record that the enclosures were sent to Tyco.

Tyco filed its documents with AF, but never returned the P-Form to Cincinnati and did not provide Cincinnati with a copy of materials it sent to AF.[1] AF's rules provide that a respondent answers by filing its P-Form and Contentions Sheet with AF and all other involved parties ten days prior to the hearing and state that "[p]ersonal representation will not be allowed in cases when an answer has not been filed as outlined above."

Despite the incomplete P-Form submitted by Cincinnati to AF, AF, contrary to its rule that a *completed* P-Form is required to initiate the proceedings, concluded that Cincinnati waived notice of and appearance at the arbitration hearing, and proceeded with the arbitration without notice to Cincinnati. Despite Tyco's failure to answer according to

the rules by providing Cincinnati with a copy of the documents it submitted to AF, AF allowed Tyco to be represented at the arbitration hearing. Tyco did not question AF's decision to proceed without notice to or appearance by Cincinnati, and Tyco either failed to apprise AF of its failure to provide its submission to Cincinnati or took advantage of AF's oversight in allowing Tyco to appear personally, contrary to AF's rules.

On October 12, 2005, Cincinnati's counsel, who had not received any documents from Tyco or any notice from AF, contacted AF and discovered that the arbitration hearing had taken place and that a decision favorable to Tyco had been issued on October 3, 2005. AF was unable to explain, at that time, why the matter had proceeded without Cincinnati's participation or why the decision had not been mailed to Cincinnati. Cincinnati did not receive a copy of the decision until November 16, 2005. The decision stated that the matter was filed on July 25, 2005, and awarded nothing to Cincinnati on the ground that Cincinnati had failed to prove a manufacturing defect. The "explanation of decision" stated: "Appl contends fire marshall says sprinkler head defective, yet offers no evid. Appl expert Baymildoors conslusion[sic] are not supported by evid." Cincinnati had a metallurgical expert named John Brynildson, but no expert named "Baymildoor."

Cincinnati petitioned the district court to vacate the arbitration award under Minn. Stat. § 572.19 subd. 1(1) (2004), as procured by "other undue means." The district court granted the petition on the basis that AF failed to remedy an oversight it should have noticed in Cincinnati's P-Form. Tyco appealed.

By notice of review, Cincinnati asserts three alternate theories of how the decision was procured by other undue means: (1) the decision was the result of improper ex parte

contacts between AF and Tyco; (2) Tyco should not have been allowed to be represented at the hearing under the rules contained in the arbitration agreement because Tyco failed to file its documents with Cincinnati, and (3) AF, under the rules set out in the arbitration agreement, should not have initiated the arbitration without requiring that Cincinnati complete the P-Form by signing and dating it.

D E C I S I O N

A party seeking to vacate an arbitration award has the burden of proving the invalidity of the award. *Nat'l Indem. Co. v. Farm Bureau Mut. Ins. Co.*, 348 N.W.2d 748, 750 (Minn. 1984).

An arbitration award "will be vacated only upon proof of one or more of the grounds stated in Minn. Stat. § 572.19." *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984) (footnote omitted). Minn. Stat. § 572.19 (2006), provides in relevant part, that on the application of a party, the district court shall vacate an arbitration award where:

> (1) The award was procured by corruption, fraud, or other undue means;
>
> . . . .
>
> (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 section 572.12, as to prejudice substantially the rights of a party[.]

Minn. Stat. § 572.12 (2006) requires, in relevant part, that unless otherwise provided by the agreement, the arbitrators shall give notice of the hearing personally or by certified

mail not less than five days prior to the hearing, and that "[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."

In this case, the district court vacated the arbitration award as procured by undue means, stating that "[b]ecause of AF's failure to discern that Cincinnati had not checked the notice box on the P-Form and to remedy the oversight, the . . . decision . . . was achieved through undue means . . . substantially prejudicing the rights of Cincinnati to participate in the arbitration proceedings."

Tyco asserts that neither its conduct nor AF's conduct met the definition of undue means as that term has been interpreted in the caselaw. Tyco relies on an unpublished opinion of this court to assert that "'[u]ndue means' within the Uniform Arbitration Act, generally refers to an improper relationship between one of the parties and the arbitrator and definitely requires evidence of impartiality." *West v. Heart of the Lakes Constr., Inc.*, C5-01-1823, 2002 WL 1013529 at *4 (Minn. App. May 21, 2002) (footnote omitted).

In *West*, this court cited the following authorities for the proposition that undue means generally refers to an improper relationship between a neutral and a party: *Safeco Ins. Co. of Am. v. Stariha*, 346 N.W.2d 663, 665-66 (Minn. App. 1984); *Nasca v. State Farm Mut. Auto. Ins. Co.*, 12 P.3d 346, 350-51 (Colo. Ct. App. 2000); and *Gerl Const. Co. v. Medina County Bd. of Comm'rs*, 493 N.E.2d 270, 276 (Ohio Ct. App. 1985). *Id.*at *4, n.4. But each of these cases involved an alleged relationship between a neutral and a party. While the cases stand for the proposition that "other undue means," as used in the Uniform Arbitration Act, *includes* a substantial undisclosed relationship between a neutral

and a party, we do not read the cases as *limiting* "other undue means" to such relationships.

The authority cited in *West* for the proposition that "undue means . . . requires evidence of impartiality," is *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147, 89 S. Ct. 337, 338-39 (1968) (stating that section of United States Arbitration Act, authorizing vacation of an award procured by corruption, fraud, or undue means or if partiality by arbitrator, was evidence that shows "desire of Congress to provide not merely for *any* arbitration but for an impartial one"). *Id.* at 147, 89 S. Ct. at 338. Again, the authority cited does not limit the meaning of "other undue means" to situations in which there is evidence of partiality by a neutral. We therefore find the statement relied on by Tyco from *West*, an unpublished opinion, not persuasive in the context of the matter before us.

We are more persuaded by Tyco's argument that, consistent with the rule of statutory construction that words in a statute should be construed with reference to the words surrounding them, "other undue means" should be construed with reference to the words "corruption" and "fraud." *See Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 920 (Minn. App. 1999) (stating that under the doctrine of *noscitur a sociis*, a phrase capable of several meanings is defined by the words with which the phrase is associated), *review denied* (Minn. Oct. 21, 1999). And Tyco has provided cases from other jurisdictions stating that undue means in the context of the United States Arbitration Act requires something akin to fraud and corruption. *Spiska Eng'g, Inc. v. SPM Thermo-Shield, Inc.*,678 N.W.2d 804, 806 (S.D. 2004) (stating that "[g]enerally, courts have defined the

term in conjunction with 'corruption' and 'fraud'"); *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104, 108 (N.D. Ill. 1980) (stating that "undue means" in context of the United States Arbitration Act "requires some type of bad faith in the procurement of the award"), *aff'd*, 653 F.2d 310, 313 (7th Cir. 1981); *Seither & Cherry Co. v. Ill. Bank Bldg. Corp.*, 419 N.E. 2d 940, 945 (Ill. App. Ct. 1981) (stating that "'[u]ndue means' goes beyond the mere inappropriate or inadequate nature of the evidence and refers to some aspect of the arbitrator's decision or decision-making process which was obtained in some manner which was unfair and beyond the normal process contemplated by the arbitration act").

In this case, the district court did not explicitly find that what it determined to be "other undue means" was akin to corruption or fraud or was obtained in some unfair manner. But from our review of the record, we conclude that Cincinnati has met its burden to show that the decision-making process in this case was obtained in a manner that was unfair and beyond the normal process contemplated by the arbitration act, and more specifically, beyond the process contemplated by the arbitration agreement in this case.

AF, for reasons not explained in the record, initiated the proceeding based on an obviously incomplete P-Form submitted by Cincinnati, which was attached to a letter that specifically stated that the original P-Form would be submitted when it was returned by Tyco. Tyco, with the completed P-Form requesting notice and appearance in its possession, allowed AF to exclude Cincinnati from the proceedings. AF failed to disqualify Tyco from appearing, despite its failure to serve Cincinnati with arbitration

documents, and Tyco either misled AF about having filed its documents with Cincinnati or took unfair advantage of AF's oversight in allowing it to appear. As the district court rightly concluded, the manner in which this matter proceeded to hearing substantially prejudiced the rights of Cincinnati to participate in the proceedings. On this record, we conclude that the district court did not err by vacating the award as procured by "other undue means" under Minn. Stat. § 572.19, subd. 1(1).

Tyco argues that Cincinnati did not raise the issue of ex parte contact in the district court and that this court should therefore decline to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (1988) (stating that a party may not obtain review of an issue by raising the same general issue as that litigated below but under a different theory). But this court may affirm the vacation on an alternative basis from that stated by the district court. *See County of Hennepin v. Hennepin County Ass'n of Paramedics & Emergency Medical Technicians*, 464 N.W.2d 578, 580, 582 (Minn. App. 1990) (affirming vacation of arbitration award on alternative basis from ground stated by district court). Appellate courts have a responsibility to decide cases in accordance with the law, and that responsibility should not be diluted by counsel's oversight. *State v. Hannuksela*,452 N. W.2d 668, 673 n.7 (Minn. 1990); *Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. App. 1990) (applying *Hannuksela* in a civil case), *review denied* (Minn. Feb. 4, 1991). Further, the Minnesota Supreme Court has recently concluded that a claimant is not procedurally barred from raising on appeal a claim that is a refined version of a claim made to the district court, as long as the claim can be evaluated based on the record. *Jacobson v. $55,000 in U. S. Currency*, 728 N.W.2d 510, 523 (Minn. Mar. 15,

2007).

We conclude that Tyco's failure to provide its arbitration documents to Cincinnati resulted in Tyco having ex parte communication with the neutrals in this case. Even if Cincinnati could be said to have waived notice of and appearance at the hearing, Cincinnati never waived its right to receive copies of Tyco's submissions or its right to amend its own submissions in response to Tyco's submissions. The ex parte presentation of Tyco's evidence in this arbitration further supports our conclusion that the decision was procured in an unfair manner constituting "other undue means" as that term is used in the statute.

We further conclude that vacation of the arbitration award should be affirmed under Minn. Stat. § 572.19, subd. 1(4), on the alternative ground that the hearing in this matter was conducted contrary to the due process requirements in Minn. Stat. § 572.12 and substantially prejudiced Cincinnati's rights under that section. Whether challenged conduct constitutes prejudicial misconduct is reviewed de novo. *Aaron v. Ill. Farmers Ins. Group*, 590 N.W.2d 667, 669 (Minn. App. 1999). Cincinnati argued in the district court that the manner in which this decision was procured violated its rights to due process, which is the substance of Minn. Stat. § 572.12.

Minn. Stat. § 572.12 requires that unless otherwise provided by the arbitration agreement, the arbitrators must have notification of the arbitration hearing served on the parties "personally or by certified mail not less than five days before the hearing." Minn. Stat. § 572.12(a). And the parties have the right to be heard, to present evidence, and to cross-examine witnesses at the hearing. As discussed above, the purported waiver of

these rights was not "provided by the agreement" because (1) AF ignored the requirement of a completed P-Form and (2) Tyco ignored the requirement that it provide its arbitration documents to Cincinnati and that its failure to do so would waive its own appearance at the hearing.

Affirmed.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] At oral argument on appeal, Tyco asserted that it is unclear whether or not Tyco provided a copy of its arbitration documents to Cincinnati, but the district court specifically found that "Cincinnati was never furnished with [Tyco's] arbitration submissions filed with AF," and this finding was not challenged on appeal.