COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1217

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GEORGE HECHIMOVICH, AUDREY HECHIMOVICH, AND DANIEL HECHIMOVICH,

PLAINTIFFS-RESPONDENTS,

V.

SUPERIOR SERVICES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Eich and Deininger, JJ.

DYKMAN, P.J. Superior Services, Inc. (Superior) appeals from an order granting partial summary judgment in favor of George, Audrey and Daniel Hechimovich regarding the estimated future cost of cleaning up a contaminated landfill, which Superior purchased from the Hechimoviches in 1993, and from a

judgment declaring that disputes concerning the future clean-up costs were not arbitrable. Superior contends that the trial court erred by concluding that the parties did not intend to arbitrate disputes over the future clean-up costs. It asserts that all three of the relevant agreements in the sale of the landfill expressly provide that such a dispute is to be resolved through binding arbitration. We agree and we therefore reverse. Because we reverse on this issue, we need not address the remaining issues of: (1) whether the Stock Sale Agreement was ambiguous regarding the parties intent to have a third-party engineer make a final and conclusive determination as to future clean-up costs; (2) whether the third-party engineer's determination was the product of fraud, collusion, bad faith or gross mistake; (3) whether the third-party engineer's conclusion was reasonable; and (4) whether the third-party engineer followed the standards and procedures specified by the parties' contract in determining the present value of future clean-up costs.

BACKGROUND

In 1970, George Hechimovich opened a landfill in the Town of Williamstown, Dodge County, Wisconsin. In March 1984, he transferred the landfill to Land & Gas Reclamation, Inc., a corporation that he and his wife, Audrey, owned. He closed the landfill two years later in 1986. From 1970 to 1986, the landfill was licensed to accept hazardous waste. In the mid-1980's, the Wisconsin Department of Natural Resources (DNR) and the U.S. Environmental Protection Agency (EPA) investigated the landfill and determined that it was contaminating the environment. The EPA responded by listing the landfill on its National Priorities List, and the landfill became subject to a state-led Superfund clean-up action under the direction of the DNR.

On March 29,1993, Superior acquired the landfill, which was still subject to the Superfund clean-up action, when it acquired Land & Gas Reclamation, Inc. under a Stock Sale Agreement. Under paragraph 11.2.2(d) of the Stock Sale Agreement, the Hechimoviches agreed to indemnify Superior for any clean-up costs that might be incurred, up to a maximum of $2,800,000. Under the indemnification section of the Stock Sale Agreement, the parties agreed that if they were unable to resolve a dispute concerning indemnification by mutual agreement, either party could submit the matter for final and binding arbitration.

On the same day, the parties also entered into an Escrow Agreement under which the Hechimoviches agreed to place $2,800,000 worth of Superior stock in escrow to secure future clean-up costs. The "Escrow Agreement-Stock" incorporated the terms and conditions of the Stock Sale Agreement, and it created a mechanism under which Superior could make demands on the escrowed stock for the clean-up costs it incurred. Under the terms of the Escrow-Agreement-Stock, the Hechimoviches had the right to object to a demand for indemnification. Similar to the Stock Sale Agreement, the Escrow Agreement-Stock included a provision stating that any disputes concerning the payment of escrowed stock were to be resolved through arbitration.

The Escrow Agreement-Stock and the Stock Sale Agreement both included provisions that if the cost of future remediation was not fixed and determinable as of March 31, 1997, Superior was to prepare a good-faith estimate of the future clean-up costs and make a "demand" for indemnity from the Hechimoviches. If the Hechimoviches did not agree with Superior's estimate, the Hechimoviches were entitled under § 14.2 of the Stock Sale Agreement to retain a "third party licensed professional engineer," at Superior's cost, to determine the future cost of cleaning up the landfill.

By March 1997, the level of contamination at the landfill had not improved, and it appeared that more aggressive clean-up measures would be necessary. Superior estimated that the future cost for cleaning up the landfill site would significantly exceed the amount held in escrow. Therefore, before the escrow was to terminate, Superior made a demand for indemnification for the $2.6 million worth of escrowed stock. The Hechimoviches objected to this demand, stating that they had estimated the future cost of cleaning up the landfill to be less than $1 million.[1]

Pursuant to § 14.2 of the Stock Sale Agreement, the Hechimoviches designated Dennis Iverson as the third-party professional engineer who would determine the present value of future clean-up costs. Superior challenged the section of Iverson as the third-party engineer because it suspected that his prior relationship with George Hechimovich would inhibit his ability to provide an unbiased evaluation. Both sides ultimately agreed to have Iverson make the necessary findings concerning these future costs, and on August 15, 1997, Iverson issued a report in which he estimated the present value of these costs to be $687,710.69.

On September 26, 1997, the Hechimoviches filed a written demand for arbitration with the American Arbitration Association requesting an order compelling the escrow agent to disburse the escrow account consistent with Iverson's opinion regarding the future costs of cleaning up the landfill site. Superior answered the arbitration demand and counterclaimed that it was entitled

[1] The Hechimoviches also demanded a release of their stock in exchange for cash, because they believed that the value of the stock exceeded the amount that they agreed to place in escrow for indemnification purposes. Superior agreed to release the stock in exchange for cash. The cash was then held pursuant to an Escrow Agreement-Cash at the M&I Bank of Mayville.

to receive the entire amount of money being held in escrow, because its estimation regarding the future clean-up cost far exceeded the remaining amount held in escrow.

The Hechimoviches responded to Superior's answer and counterclaim by refusing to arbitrate the counterclaim. The appointed arbitrator set a hearing for January 9, 1998, solely on the issue of the arbitrability of Superior's counterclaim. However, on October 31, 1997, the Hechimoviches filed suit in circuit court requesting an order declaring that Superior was not entitled to arbitrate the issues raised in its arbitration counterclaim. On December 11, 1997, the Hechimoviches filed a motion for a temporary restraining order to enjoin the arbitrator from considering Superior's counterclaim. They also filed a motion for partial summary judgment in which they sought: (1) a judgment declaring that Iverson's opinion concerning the present value of the future clean-up costs was conclusive; and (2) an order declaring that disputes regarding the future clean-up costs were not arbitrable.

On December 19, 1997, the trial court conducted a hearing on the Hechimoviches' motion to enjoin the arbitration and then granted the motion. On March 4, 1998, the court heard the Hechimoviches' motion for summary judgment. The court concluded that partial summary judgment was appropriate. It issued a judgment declaring that Iverson's opinion as to future clean-up costs was final and binding and an order that disputes arising under section 14.2 of the Stock Sale Agreement and the Escrow Agreement-Stock were not arbitrable. Superior appeals.

STANDARD OF REVIEW

We review the trial court's grant of partial summary judgment de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment should be granted only where the moving party shows the right to judgment with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980).

DISCUSSION

Superior argues that the trial court erred by enjoining the arbitration and granting the Hechimoviches' motion for partial summary judgment. It asserts that by enjoining the arbitration, the court usurped the authority of the arbitrator to determine the scope of issues to be addressed in arbitration. We disagree. The question of whether the parties agreed to submit an issue to arbitration is a question of law for courts to decide. *See* ***Jefferson Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n***, 78 Wis.2d 94, 101, 253 N.W.2d 536, 540-41 (1977). The United States Supreme Court has held that an arbitrator cannot be the judge of the scope of his or her authority under the contract, unless the parties have clearly and unmistakably granted the arbitrator such authority. *See* ***AT&T Techs. v. Communications Workers***, 475 U.S. 643, 649 (1986). If a party contends that the arbitrator has the authority to decide the question of arbitrability that party must

bear "the burden of a clear demonstration of that purpose." ***Jefferson***, 78 Wis.2d at 102, 253 N.W.2d at 540-41 (quoted source omitted).

In this case, the parties entered into three agreements: (1) the Stock Sale Agreement; (2) the Escrow Agreement–Stock; and (3) the Escrow Agreement–Cash. Superior has not articulated where in these agreements the parties expressly gave the arbitrator "clear and unmistakable" authority to decide whether an issue is arbitrable; therefore, it has not met its burden. Without such evidence, we conclude that the trial court, not the arbitrator, should have decided whether this dispute was arbitrable.

However, whether the trial court had the authority to decide arbitrability is a separate consideration from whether the trial court's determination regarding arbitrability is correct. ***Jefferson***, 78 Wis.2d at 106-11, 253 N.W.2d at 542-44. The trial court concluded that the dispute concerning future clean-up costs was not arbitrable. On summary judgment, we independently review the record to decide whether this conclusion was correct.

We recently adopted four general principles to apply when determining the arbitrability of a dispute. *See* ***Kimberly Area Sch. Dist. v. Zdanovec***, No. 98-0783, slip op. (Wis. Ct. App. Sep. 15, 1998, ordered published Oct. 28, 1998). Those principles are as follows:

> First, because arbitration is a matter of contract, a party is not required to submit any dispute to arbitration unless it has agreed to do so. Arbitrators derive their authority only from the parties' advance agreement that they will submit such grievances to arbitration. Second, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." Third, when a court decides whether the parties have agreed to submit a dispute to arbitration, the court cannot

> rule on the merits of the underlying claim. Fourth, if the contract contains an arbitration clause, there is a presumption of arbitrability.

Kimberly Area Sch. Dist., 98-0783, slip op. at 10 (citations omitted; emphasis omitted).

We must first examine whether the parties included provisions in their agreements demonstrating an intent to submit their disputes to arbitration. Under Article XI of the Stock Sale Agreement, the parties agreed that any disputes concerning indemnification should be resolved through arbitration. The agreement reads in pertinent part:

> (d) If the … parties are unable to resolve the dispute by mutual agreement, then at any time after thirty (30) days from the date of the Demand (provided that the Shareholders have delivered a timely Opposition Notice), either Superior or the Shareholders may institute arbitration in accordance with Section (e) hereof.
>
> (e) All disputes between the Shareholders and Superior hereunder shall be settled by an arbitration pursuant to the then current rules of the American Arbitration Association. Any request for arbitration made hereunder shall indicate in detail the relief sought. The ruling of the arbitrator(s) shall be final and binding upon the parties and may be entered as a final judgment in any court of competent jurisdiction. Each party shall pay its own expenses of arbitration and one-half of the expenses and fees of the arbitrator(s).

The parties also agreed that disputes concerning the disbursement of escrow assets should be resolved through arbitration. The relevant language in the escrow agreement reads as follows:[2]

[2] The Escrow Agreement-Stock and the Escrow Agreement-Cash both include virtually identical language regarding arbitration. The sole variation is indicated in brackets.

> **Arbitration.** All disputes between the Shareholders and Superior hereunder shall be settled by [an] arbitration pursuant to the then current rules of the American Arbitration Association. Any request for arbitration made hereunder shall indicate in detail the relief sought and what action the Escrow Agent should take if the requesting party's position is upheld. The ruling of the arbitrator(s) shall be final and binding upon the parties and may be entered as a final judgment in any court of competent jurisdiction. Each party shall pay its own expenses of arbitration and one-half of the expenses and fees of the arbitrator(s).

After reviewing all three agreements, we conclude that the parties intended to have certain disputes resolved through arbitration. The question becomes whether the parties intended their dispute concerning Iverson's findings as to future remedial costs to be resolved through arbitration. We are to presume that the parties intended to arbitrate this dispute because they included arbitration clauses in their agreements. ***Kimberly Area Sch. Dist. v. Zdanovec***, No 98-0783, slip op. (Wis. Ct. App. Sep. 15, 1998, ordered published Oct. 28, 1998).

The trial court correctly determined that § 14.2 of the Stock Sale Agreement did not include an arbitration provision, but this does not end our inquiry. The issue to be decided is how much money the escrow agent should disburse to Superior for future remedial costs and liability associated with cleaning up the landfill site. A dispute over Iverson's authority and findings is necessarily a dispute over the amount the escrow agent should disburse to Superior. The language of the escrow agreements expressly provides that any dispute concerning the disbursement of escrow assets, which the parties cannot resolve through mutual agreement, will be submitted to arbitration. We conclude that because the parties incorporated the terms of their Stock Sale Agreement into their two escrow agreements, and the escrow agreements both require that all disputes regarding

disbursement be resolved through arbitration, the trial court erred in concluding that the parties did not intend to arbitrate disputes concerning Iverson's findings.

The Hechimoviches, however, contend that we should not reach this issue because Superior has waived it. First, they contend that the argument is waived because Superior noted the issue in its docketing statement but did not discuss it in its brief. We disagree. A docketing statement is an artifact of the expedited appeals process; it does not determine what issues are raised and what issues are waived. The Hechimoviches also argue that Superior did not designate with specificity the provisions in the agreements that operate to subject this issue to arbitration. We again disagree. Superior noted in its brief that the arbitration provisions of the three documents show that this matter should be submitted for arbitration. Its brief reads:

> The Escrow Agreement-Stock and Escrow Agreement-Cash, under which the parties made their demands, provide for arbitration of all disputes regarding distribution of the escrow. Moreover, the underlying Stock Sale Agreement provides for resolution through arbitration of all disputes regarding the amount of indemnity owed by Hechimovich to Superior. Under these circumstances, there should have been no question but that the proper forum was arbitration.

We are satisfied that the arbitration provisions in the agreements are sufficiently identifiable to support Superior's argument. We are also satisfied that Superior articulated relevant case law supporting its argument.

Finally, the Hechimoviches contend that this issue is waived because it has been adjudicated by the trial court. We reject this contention. The very purpose of appellate courts is to review trial court decisions. An assertion that an appellate court cannot address an issue because the trial court did so is the

antithesis of what appellate review contemplates. We are not persuaded that Superior waived its right to challenge the trial court's arbitrability decision.

CONCLUSION

We conclude that the trial court erred by concluding that the dispute regarding Iverson's findings was not arbitrable. We therefore reverse and remand with instructions to dissolve the injunction and require this matter to be arbitrated.

By the Court.—Judgment and order reversed and cause remanded with directions.

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