

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000936-MR

RICKY ROBINSON AND HIS WIFE,  
TONIA ROBINSON; ROBINSON AND  
HICKS CONSTRUCTION, INC.;  
DAVID SIZEMORE AND HIS WIFE,  
VALERIE SIZEMORE; MARK D'ONOFRIO  
AND HIS WIFE, KRISTI D'ONOFRIO;  
TERRY NORTH AND HIS WIFE,  
KIM NORTH; RIZWAN ALI AND HIS  
WIFE, SHAHEEN ALI; CLARICE W.  
WALLACE; HOWARD FELTNER AND HIS  
WIFE, PHYLLIS FELTNER; AND JERRY WYRICK

APPELLANTS

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 99-CI-00134

ROY CAMPBELL

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

HENRY, JUDGE: Appellants appeal from an April 26, 2004 order of the Perry Circuit Court that vacated an arbitrator's award in

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<sup>1</sup> Senior Judge John Woods Potter, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

their favor. Upon review, we vacate the circuit court's order and remand for further proceedings.

Appellants are either developers or homeowners in the Apple Ridge subdivision, a residential mountainside community built on a mine bench above Highway 80 in Perry County, Kentucky. Appellants Ricky and Tania Robinson and Robinson & Hicks Construction Company, Inc. (hereinafter "RHCC") purchased the Apple Ridge property from Appellee Roy Campbell for the purpose of building a residential subdivision thereon. Campbell continued to own the property directly below Apple Ridge and, after the sale, he began excavating his property for its own development. This excavation allegedly undermined the slope of the mountainside, resulting in damage to the Apple Ridge development.

Specifically, Appellants allege that the removal of the subjacent support for the slope caused it to collapse in places and to sink several feet, resulting in damage to the Apple Ridge homes and to Apple Ridge Lane (the only access road to the development) and a decrease in the value of the remaining undeveloped property. Appellants further allege that damage continues to this day, as the slope continues to slide and sink. Appellants also note that an investigation by the United States Department of Surface Mining has apparently concluded that

Campbell's removal of the toe of the slope has resulted in damage to their property.

Consequently, on March 11, 1999, the Robinsons and RHCC filed suit against Campbell in Perry Circuit Court seeking damages for the destruction of the value of the Apple Ridge property and for the business damage caused to RHCC. Eventually, after additional parties entered into the litigation, it was agreed that the matter would be submitted to Pierce Hamblin for binding arbitration pursuant to a written arbitration agreement. The agreement set forth that Hamblin had the power "to fully adjudicate this dispute and to grant all remedies necessary to implement such adjudication." It further stated that "[t]he parties hereby agree to submit to binding arbitration the respective claims and controversies mentioned above, together with all demands and differences arising out of the agreement."

As required by the agreement, the parties made submissions to Hamblin, and an arbitration hearing was held on November 15, 2003 according to rules mutually agreed upon by the parties. These rules included an agreement that each witness would make an oral statement as to the substance of his testimony and an agreement that cross-examination would not be permitted. Following the hearing, Hamblin rendered an "Arbitration Opinion and Award" on January 16, 2004, finding

that "the primary and precipitating cause for the damages sustained by [Appellants] was excavation and/or removal of the subjacent support system below the mine bench of Apple Ridge subdivision [by Campbell]" and awarding Appellants the combined sum of \$732,500.00. Hamblin's decision rested primarily upon the results of the investigation conducted by the U.S. Department of Surface Mining, which found that "one can only conclude that in this case, the landslide was caused by the excavation work performed along the toe of the slope below the subdivision bench."

Campbell subsequently sought to amend Hamblin's arbitration award, ostensibly pursuant to the statutorily-permitted challenges set forth under KRS<sup>2</sup> 417.130 and 417.170(1). He specifically claimed that there was a miscalculation of figures on Hamblin's part, and also that Hamblin rendered an award on a matter not submitted to him. In an "Arbitrator's Decision" rendered on February 20, 2004, Hamblin found that Campbell's contentions lacked merit because, substantively, they did not fall under the permitted challenges set forth under the statute. As to Campbell's first challenge, Hamblin specifically found that the "Arbitration Opinion and Award contained no calculation of figures in which there could have been an 'evident miscalculation,' and no mathematical error was pointed

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<sup>2</sup> Kentucky Revised Statutes.

to by [Campbell]," and that Campbell's "objection to the items of damages awarded is not an objection to the calculation of same, but to the judgment of the Arbitrator in making the award." As to Campbell's second contention, Hamblin concluded that all matters were submitted to him pursuant to the arbitration agreement. He further noted: "The award and all items of damages therein were properly within the scope of matters submitted to arbitration, and in any event could not be modified without affecting the merits of the decision upon the issues submitted." Hamblin then stated a general conclusion that "the challenges forwarded by [Campbell] go to the merits of the decision, and therefore fail" and noted that even if KRS 417.170(1) allowed an arbitrator to modify or correct an award based on the merits, no such modification or correction was necessary here because the award was justified by the evidence.

Campbell subsequently moved the circuit court to vacate the arbitrator's award, arguing that - pursuant to Carrs Fork Corp. v. Kodak Mining Co., 809 S.W.2d 699, 702-03 (Ky. 1991) - the award was so excessive as to be tantamount to fraud, and also that it was obtained by undue means in violation of KRS 417.160(1)(a). Campbell specifically objected to the fact that Appellants had submitted an arbitration memorandum to Hamblin, arguing that although the arbitration agreement allowed for concurrent submission of items to be considered by the

arbitrator and did not require service of those items to opposing counsel, the failure to serve counsel constituted obtaining the award by undue means. Campbell also reiterated his argument that the evidence was insufficient to support the damages awarded.

Campbell's challenge was heard by the circuit court on April 16, 2004. At the hearing, the special judge decided to vacate the arbitrator's award, with his justification for his decision reading only as follows: "Well I have a real question as to what the arbitrator based his decision on and the only thing that is submitted that he based his decision on, because I don't have a transcript of anything else, is this memorandum which was not supplied to opposing counsel. Motion to vacate is sustained." An order vacating the award was entered on April 26, 2004, with no specific basis for the ruling given therein. This appeal followed.

On appeal, Appellants raise the following arguments: (1) The arbitration below was final and binding and not subject to review by the circuit court; (2) Campbell's arguments in support of vacating the arbitration award are disguised challenges to the evidence that are not reviewable by courts; and (3) Appellants' submissions to the arbitrator were specifically contemplated by the arbitration agreement and do not constitute fraud that would allow a court to vacate the

award. Campbell argues in rebuttal that the circuit court properly vacated the arbitration award because it was procured by fraud and undue means - specifically, the "ex parte" memorandum submitted by Appellants to the arbitrator.

As a general rule, "an arbitrator's award is not reviewable by a court." Taylor v. Fitz Coal Co., Inc., 618 S.W.2d 432, 432 (Ky. 1981) (Citations omitted). This is attributable to the fact that "settlement of disputes by arbitration is favored in the law of this Commonwealth." Lombardo v. Investment Management and Research, Inc., 885 S.W.2d 320, 322 (Ky.App. 1994) (Citations omitted). "Generally, much judicial latitude and deference are accorded to an arbitration decision. It will not be disturbed by the courts merely because it was unjust, inadequate, excessive or contrary to law." Id. (Internal quotations and citation omitted). Moreover, the sufficiency of the evidence supporting an arbitration award is specifically nonreviewable. Taylor, 618 S.W.2d at 432 (Citations omitted). "This is so because when a court examines the evidence and imposes its view of the case it substitutes the decision of another tribunal for the arbitration upon which the parties have agreed, and in effect sets aside their contract." Id. at 433 (Citation omitted).

With this said, the Kentucky Uniform Arbitration Act (hereinafter "KUAA") - specifically KRS 417.160 - provides that

a court may vacate an arbitration award pursuant to five specific grounds: (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 arbitration hearing upon sufficient cause being shown therefore, or refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; and (5) there was no arbitration agreement, and the issue was not adversely determined in proceedings under KRS 417.060, and the party did not participate in the arbitration hearing without raising the objection. KRS 417.160(1)(a)-(e). With respect to all arbitration agreements entered into after the effective date of the KUAA - July 13, 1984 - a court may only set aside an arbitration award pursuant to those grounds set forth in KRS 417.160. 3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government, 134 S.W.3d 558, 562-63 (Ky. 2004).

The difficulty with which we are faced in considering the parties' arguments is that we are unable to ascertain from the circuit court's rulings the exact basis for its decision to vacate. As previously noted, the court simply stated: "Well I



have a real question as to what the arbitrator based his decision on and the only thing that is submitted that he based his decision on, because I don't have a transcript of anything else, is this memorandum which was not supplied to opposing counsel. Motion to vacate is sustained."

Campbell generally argues that the circuit court properly vacated the arbitration award because it was procured by fraud and undue means - specifically, the "ex parte" memorandum submitted by Appellants to the arbitrator.

Appellants, on the other hand, contend that the circuit court "made no finding that the award had been procured by corruption, fraud or other undue means," and that its decision "was clearly based upon his inability to review the sufficiency of the evidence." Obviously, then, the parties themselves cannot even agree on the basis for the circuit court's decision. We are similarly unable to make this determination.

In this same context, we have reservations as to whether the circuit court considered the appropriate standards in vacating the arbitrator's award. The 3D Enterprises decision cited above, which sets forth that all arbitration awards arising from agreements entered into after the effective date of the KUAA can only be vacated pursuant to those grounds set forth in KRS 417.160, was issued on May 20, 2004 - shortly after the circuit court entered its vacating order. This is of particular

importance here because this decision partially overruled Carrs Fork to the extent that that case allowed for courts to vacate arbitration awards arising from post-KUAA agreements on equitable grounds - including the ground that an award is so grossly excessive as to be, in effect, a fraud. See 3D Enterprises, 134 S.W.3d at 561-63. Campbell specifically relied upon this ground as a basis for relief in his motion to vacate, which raises a concern that the Carrs Fork case was an inappropriate consideration in the circuit court's decision. While the circuit court did not specifically cite to Carrs Fork in its decision to vacate, it did raise a question about the evidentiary basis for the arbitrator's award - a dubious consideration in light of 3D Enterprises and Taylor v. Fitz Coal Co., Inc.

Moreover, given that the only grounds for vacating an arbitration award, per 3D Enterprises, are those set forth within KRS 417.160, we find it troublesome that the circuit court failed to address them - or even mention the statute - in ordering the award here to be vacated. This again raises the question of whether the circuit court used the appropriate standards in reviewing the arbitrator's award. Consequently, given our inability to ascertain the basis of the circuit court's ruling and the concerns noted above, we believe that it is appropriate in this case to vacate the court's order and

remand this matter for further consideration consistent with KRS 417.160, 3D Enterprises, and this opinion.

GUIDUGLI, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

POTTER, SENIOR JUDGE: I concur in the majority's decision to set aside the circuit court order vacating the arbitrator's award, but dissent from its remand of the case for the circuit court to reconsider its ruling in light of a 1984 statute as recently construed by the Supreme Court of Kentucky. I would remand the case with direction to reinstate the award of the arbitrator.

In 3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government, 134 S.W.3d 588 (Ky. 2004), decided after the lower court rendered the decision at issue in this appeal, the Supreme Court raised the rather high bar for a party seeking to set aside an arbitration award even higher. The facts upon which appellee relied in getting the circuit court to set aside the award in this case were merely the submission of an allegedly improper memorandum to the arbitrator prior to the arbitration. To me, it is clear that those facts are on their face insufficient to justify setting aside the award as having been procured by "corruption, fraud or other undue means" under KRS 417.16(1)(a). Thus, taking as true

appellee's allegations, there is no basis upon which he could prevail on remand and consequently nothing to be gained by reconsideration on remand.

As long ago noted by the Court in Blight's Lessee v. Atwell, 7 T.B. Mon. 264, 23 Ky. 264, 266 (1828):

... it would seem to be doing a vain and useless thing to reverse the judgment and remand the cause to the court below for further proceedings, if from the face of the record, the plaintiff was shewn to have no title to the land in contest, and could not, therefore, succeed in recovering judgment.

So it is in this case. Because appellee's allegations are insufficient to meet the statutory standard for setting aside the award of the arbitrator, the only appropriate action on remand is the reinstatement of that award.

BRIEF FOR APPELLANT:

D. Eric Lycan  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Warren N. Scoville  
London, Kentucky