COURT OF APPEALS
DECISION
DATED AND RELEASED

January 9, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1735

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

GREGORY J. GRAMBOW,

Claimant-Respondent-Cross Appellant,

v.

ASSOCIATED DENTAL SERVICES, INC.,
DR. ROBERT F. CHOJNACKI,
DR. JOHN SEBANC,
DR. DAVID H. ERICKSON,
DR. STEPHEN F. FROEHLICH,
DR. JESLEY C. RUFF and
DR. GERALD D. PATTERSON,

Respondents-Appellants-Cross Respondents.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Associated Dental Services, Inc., (ADS Inc.) appeals from a judgment confirming an arbitration award in favor of Gregory J. Grambow, ADS Inc.'s former president and stockholder. Grambow cross-appeals from the judgment which also denied his motion for frivolous fees and costs.

ADS Inc. advances two arguments for review. It contends: (1) that the determination of the value of Grambow's shares under a post-employment stock redemption plan is not subject to arbitration and, therefore, the arbitrators exceeded their authority when they determined the value of the shares; and (2) that the arbitration award in which Grambow received $608,231 was a perverse usurpation of the arbitrators' concerted authority and a manifest disregard of the law. We reject ADS Inc.'s arguments and affirm.

Grambow argues in his cross-appeal that the trial court erred in denying his motion for frivolous fees and costs. He also moves this court for costs and fees for what he alleges is ADS Inc.'s frivolous appeal. We reject his argument and affirm the trial court judgment denying his motion. We further deny his motion on appeal for frivolous fees and costs.

I. BACKGROUND

Grambow was president of ADS Inc. from 1982 until his termination in 1992. In January 1991, ADS Inc. and its shareholders entered into a stock redemption and purchase agreement, the relevant portions of which are discussed below. In February 1992, ADS Inc. terminated Grambow's employment with the company. In April 1992, ADS Inc. notified Grambow that, according to its calculations, Grambow's twenty percent stock interest in ADS Inc. had a book value of $169,818.34, and formula value under the agreement of $118,508. In May 1992, Grambow notified ADS Inc. of his election of the formula value for stock valuation as required under the agreement, but he also demanded arbitration on the determination of the stock value pursuant to the agreement.

In October 1993, a panel of three arbitrators conducted a evidentiary hearing and received expert evidence concerning the stock

redemption plan. In December 1993, the panel unanimously awarded Grambow $608,231 for his shares of ADS Inc. stock. ADS Inc. then appealed the arbitration decision to the circuit court, seeking an order to vacate or modify the award. Grambow counterclaimed for confirmation of the award and moved the court for frivolous fees and costs. On May 18, 1994, the trial court entered a judgment confirming the arbitration award, but denying Grambow's motion for frivolous fees and costs. The appeal and cross-appeal both arise out of this judgment.

II. ANALYSIS

Because the resolution of this appeal turns on the language of the agreement executed between ADS Inc. and Grambow, we first set forth the relevant provisions of the agreement. The stock redemption and purchase agreement contained the following provisions concerning the stock valuation determination:

> 5. Redemption or Purchase Price.
>
> The price per share of any share of stock to be redeemed or purchased pursuant to this Agreement shall be its proportionate share (i.e., a ratio of one to the total shares outstanding) of: (a) the total book value of "stockholder's equity" in the Corporation as of the end of the fiscal year preceding the date of discharge, disability, death or delivery of an offer to have shares redeemed hereunder, as the case may be; or (b) at the offeree Shareholder's option, pursuant to written notice given to the Corporation within ten (10) days of the determination of book value, as provided above, the value determined in accordance with the formula attached as Exhibit A. The determination of the price per share whether made pursuant to (a) or (b) above shall be made by the Corporation in accordance with historical accounting practices followed by the Corporation.
>
> ....

SCHEDULE A

Price per Share = .80* x $\frac{\text{Value of Corporation}}{\text{\% of Outstanding Shares}}$

Value = $\frac{E\ (1 + g)}{R - g}$

E = Base Level Earnings
g = Annual Rate of Growth
R = Discount Rate of 28.4%

*This factor is included in the formula only if the shares being valued constitute, in the aggregate, less than 51% of the then outstanding shares.

The agreement also contained an arbitration provision:

> 19. Arbitration. All controversies arising under and in connection with or relating to the interpretation of this Agreement shall be settled by arbitration in Milwaukee, Wisconsin in accordance with the then existing rules of the American Arbitration Association, and the decision so rendered shall be binding and conclusive on all parties concerned.

"[T]he role of a reviewing court in the arbitration context is essentially supervisory, with the goal of assuring that the parties are getting the arbitration" for which they contracted. ***City of Madison v. Madison Professional Police Officers Ass'n,*** 144 Wis.2d 576, 585-86, 425 N.W.2d 8, 11 (1988) (citation omitted). Thus, Wisconsin courts have "adopted a `hands off' approach to arbitration awards." ***Id***. at 587, 425 N.W.2d at 12 (citation omitted). That being the case, we will not "overturn the arbitrator's decision for mere errors of law or fact, but only when `perverse misconstruction or positive misconduct [is] plainly established, or if there is a manifest disregard of the law, or if the award itself is illegal or violates strong public policy.'" ***Id***. at 586, 425

N.W.2d at 11 (citation omitted; bracketed materials in original); *see also* §§ 788.10 & 788.11, STATS.

ADS Inc.'s first argument implicates the agreement's construction and interpretation. ADS Inc. contends that "[t]he parties only bargained to have controversies involving the `interpretation of the Agreement' subject to arbitration; they did not bargain to have arbitrators make decisions which were vested solely in the discretion of one or the other of such parties." Essentially ADS Inc. argues that the determination of the stock value was not subject to arbitration, and that the arbitration panel therefore exceeded its authority under the arbitration provision of the agreement. We disagree.

Arbitration is a matter of contract and, as such, it is in the province of this court to ascertain whether, on the basis of the parties' contract, ADS Inc. is bound to arbitrate. *See generally* ***Atkinson v. Sinclair Refining Co.,*** 370 U.S. 238 (1962). Our scrutiny as to the arbitrability of Grambow's claim is limited to a determination whether: (1) there exists a construction of the Agreement's arbitration clause that would cover the grievance on its face; and (2) whether any other provision of the contract specifically excludes it. *See* ***Joint Sch. Dist. Number 10 v. Jefferson Educ. Ass'n***, 78 Wis.2d 94, 111, 253 N.W.2d 536, 545 (1977). We recognize that "`[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" ***Id***. at 112, 253, N.W.2d at 545 (citation omitted).

We believe a reasonable interpretation of the agreement supports Grambow's claim for arbitration. The arbitration provision provides: "All controversies arising under and in connection with *or* relating to the interpretation of the Agreement shall be settled by arbitration." (Emphasis added.) The language unequivocally affords arbitration in two instances—in the event that a dispute has arisen under the Agreement—*or* where its interpretation is challenged. Consistent with this construction, a controversy surrounding the shares' value is a matter appropriate for arbitration. Thus, we reject ADS Inc.'s argument that the arbitration panel exceeded its authority when it determined the stock value.

Secondly, ADS Inc. argues that the arbitrators' award was perverse and an utter disregard of the law. ADS Inc., however, provides this court with no reasonable basis from which we can reach this conclusion. We find no basis to suggest that the arbitrators' award was without "foundation in reason." Although ADS Inc. asserts that the valuation was not made "in accordance with historical accounting practices," there exists no Generally Accepted Accounting Principle ("GAAP") rule that defines variables E or g under the Schedule A formula nor, as ADS Inc.'s experts conceded, could these variables be obtained from the company's financial statements. As such, the arbitrators were guided by their professional experiences and the agreement's underlying principles. Both parties received that for which they contracted—the arbitrators accorded values to both variables E and g in conformance to the agreement's arbitration clause. While Grambow's award was significantly greater than the value under ADS Inc.'s computational method, we cannot say, given the great deference due to the arbitrators' award, that it was without "foundation in reason." It certainly does not rise to the level of a perverse misconstruction.

Further, we decline to express a preference for ADS Inc.'s accounting over Grambow's appraisal method of applying the formula. The arbitrators could properly give credence to Grambow's expert in the field of valuation of closely-held corporations, who testified that there is no recognized "accountancy" approach to valuation of a closely-held corporate interest. Using ADS Inc.'s method, he concluded that in 1990, Grambow's interest would be a negative $86,156; that in 1992, it would be worth $95; and that in 1993, it would be worth a negative $41,013. Demonstrating the sensitivity of the formula to use of arbitrary numbers, the expert calculated that if ADS Inc.'s pre-tax earnings increased by $4,000 from 1992 to 1993, Grambow's 20.2% share interest would have been worth $2,264,662 at the close of 1993.

ADS Inc.'s argument that the arbitrators manifestly disregarded the law is largely a continuation of their argument that they improperly used the appraisal method of calculation, contrary to the express terms of paragraph 5 and Schedule A. They emphasize language that price determination will be made in accord with "historical accounting practices made by the Corporation."

An award will be overturned if it evidences a manifest disregard for the law. *See* ***Lukowski v. Dankert,*** 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1994). If the law is not disregarded, however, we uphold the award if a

reasonable foundation exists for the interpretation of the contract. *See* ***id.*** at 153, 515 N.W.2d at 887. No disregard for the law exists if substantial authority supports the arbitrators' assumption as to the law. ***Id.***

The arbitrators determined that the agreement was valid and enforceable under Wisconsin law. The arbitrators further utilized methods to determine value as provided in the agreement. Finally, the arbitrators made no material miscalculation of figures. *See* § 788.11(1)(a), STATS. They set an award within the range presented by the parties. As such, the arbitration award stands.

FRIVOLOUS COSTS

Grambow's cross-appeal demands costs provided by § 814.025(1), STATS., which imposes costs as provided by § 814.04, STATS., including reasonable attorney fees, as a condition to a determination of frivolousness. Section 314.025(3)(b) requires the trial court to make findings as follows:

> (b) The party of the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Also pending before this court is Grambow's motion for frivolous appellate costs under RULE 809.25(3), STATS.

Grambow argues that although ADS Inc. was aware of the limited scope of an arbitration award action in the circuit court, it nevertheless filed the action; that ADS Inc. did not, and on appeal does not, seek an extension, modification or reversal of existing law. He asserts that in filing the circuit court action and in pursuing relief in this court, ADS Inc. chose to ignore and obfuscate the law. The trial court found that ADS Inc. did not seek extension or modification of existing law, but found that its purposes were "well intentioned."

Where the facts are undisputed, whether filing of an action for review of an arbitration award violates § 814.025(3)(b), STATS., is a legal question which we determine *de novo*. ***First Federated Sav. Bank v. McDonah,*** 143 Wis.2d 429, 433, 422 N.W.2d 113, 115 (Ct. App. 1988). The trial court found, at least by implication, that ADS Inc.'s action was not frivolous. We agree with the trial court.

ADS Inc.'s position throughout this litigation was that the unambiguous terms of the agreement vested the determination of stock value

solely with ADS Inc., and that the formula set forth in Schedule A left nothing for interpretation. In good faith it had advanced the argument that application of the appraisal method to an accounting standard was improper. We are satisfied that ADS Inc., in making this argument, sought a modification of arbitration law to impose a limitation upon arbitrators' authority to evaluate variable factors in a formula set forth in an agreement. Accordingly, we affirm the trial court's denial of frivolous fees and costs because its conclusion that ADS Inc.'s claim had a reasonable basis in law is supported by the record. For the same reason, we deny Grambow's motion for frivolous appellate fees and costs.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.