Appeal No. 2004AP2004 **Cir. Ct. No. 2002CV1601**

WISCONSIN COURT OF APPEALS
DISTRICT II

RUSSELL S. BORST AND TINA BORST,

PLAINTIFFS-APPELLANTS,

V.

ALLSTATE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

FILED

Nov 23, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Under WIS. STAT. § 788.10(1)(b) (2003-04),[1] can "evident partiality" due to a relationship between an arbitrator and a party be avoided by full disclosure at the outset and a declaration of impartiality?

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

2. Is there a presumption of impartiality among all arbitrators which may be "sidestepped" only by explicit agreement of all parties by which they may select arbitrators who in effect are their advocates?

3. Other than the deposition procedure outlined in WIS. STAT. § 788.07, is the nature and extent of discovery during the arbitration process governed by contract, the arbitrators' inherent authority, or a combination of the two?

BACKGROUND

In November 2000, Russell S. Borst was involved in a two-vehicle accident with an uninsured driver. After settlement issues arose between Borst and his insurer, Allstate Insurance Company, Borst retained legal counsel. The parties ultimately agreed to arbitrate their differences.[2]

Allstate named Attorney Rick Hills as its arbitrator.[3] Hills' firm represents Allstate and its insureds. John O'Connor, Borst's attorney, evidently

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[2] The "If We Cannot Agree" provision in the Allstate policy provides:

> If the insured person or we don't agree on that person's right to receive any damages or the amount, then at the written request of either the disagreement will be settled by arbitration. Arbitration will take place under the rules of the American Arbitration Association unless either party objects.
>
> If either party objects, the following method of arbitration will be used instead. The insured person will select one arbitrator. We will select another. The two arbitrators will select a third…. The written decision of any two arbitrators will determine the issues.

[3] The record does not reveal why the parties selected arbitrators instead of proceeding under the rules of the American Arbitration Association.

immediately challenged Allstate's choice because within days Hills wrote to O'Connor, acknowledging his affiliation with Allstate but expressing his disagreement with O'Connor's interpretation of ***DeBaker v. Shah***, 194 Wis. 2d 104, 533 N.W.2d 464 (1995), a case dealing with arbitrator partiality. Hills also assured O'Connor that "whenever I serve as an arbitrator I base my decisions on the evidence." Allstate declined to name a different arbitrator.

Allstate proceeded to serve upon Borst interrogatories, a request for production of documents, and medical authorizations, all of which Allstate contended were permissible under WIS. STAT. § 788.07 and the "Proof of Claim" provision of the insurance contract.[4] When Borst moved to quash the discovery, Allstate sought a formal order from the arbitration panel mandating discovery so that Allstate could depose Borst. The panel unanimously ordered Borst to comply and to "cooperate in other appropriate discovery."

Borst informed the panel in writing that he would not submit to deposition. The letter also stated his hope that the Court of Appeals would take the case to resolve the issues of the scope of discovery in arbitration and "whether or not an attorney can act as an arbitrator in [a] case that involves one of his firm's clients." Allstate decided to forego deposing Borst, without waiving its claimed right to do so, and to depose the uninsured driver instead. Borst responded by

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[4] The Proof of Claim provision states in relevant part:

> **Proof of Claim; Medical Reports**
>
> As soon as possible, you or any other person making claim must give us written proof of claim. It must include all details we may need to determine the amounts payable. We may also require any person making claim to submit to questioning under oath and sign the transcript.

filing suit. Numerous motions ensued, including one Borst filed seeking to bar further arbitration. The circuit court ordered that all proceedings be stayed and remanded the matter "to the previous arbitration panel" for arbitration of the uninsured motorist claim. The panel unanimously concluded that the total value of Borst's claim was $3531, but that he was fifty percent contributorily negligent and so awarded him $1765.50. The circuit court confirmed the arbitration award and denied Borst's motion to vacate it.

Borst now appeals from the order on grounds of "evident partiality" of Allstate's arbitrator, although that association was disclosed virtually at the outset of the arbitration process. Borst also raises on appeal the issue of the proper scope of discovery during the arbitration process, arguing that if he should prevail on the bias issue, the discovery issue will have to be addressed on remand.

DISCUSSION

The policy in Wisconsin is to foster arbitration as an alternative to litigation. ***Richco Structures v. Parkside Village, Inc.,*** 82 Wis. 2d 547, 553, 263 N.W.2d 204 (1978). The purpose of arbitration is to obtain a speedy, inexpensive and final resolution of disputes and thereby avoid the expense and delay of a protracted court battle. ***Diversified Mgmt. Servs., Inc. v. Slotten,*** 119 Wis. 2d 441, 449, 351 N.W.2d 176 (Ct. App. 1984). This appeal raises issues involving the nature of the relationship between arbitrators and parties, currently an uncertain blend of neutrality and advocacy, and the extent of discovery permitted during arbitration. These issues are not fully addressed either by existing case law or by the Wisconsin Arbitration Act, WIS. STAT. ch. 788.

a. Arbitrator Partiality

Under WIS. STAT. § 788.10(1)(b), upon application by a party to the arbitration, the circuit court "must make an order vacating the award … [w]here there was evident partiality … on the part of the arbitrators, or either of them." The statute does not define "evident partiality."

Borst acknowledges two supreme court cases that have discussed the phrase "evident partiality," ***Richco Structures*** and ***DeBaker***. ***DeBaker*** is the case Borst referenced when first objecting to Hills. Unlike this case, both ***Richco Structures*** and ***DeBaker*** arose in the context of nondisclosure of a relationship between an arbitrator and a party or a party's representative. ***Richco Structures***, 82 Wis. 2d at 550-51; ***DeBaker***, 194 Wis. 2d at 111.

In ***Richco Structures***, each party selected an arbitrator and these two selected a third, independent arbitrator whose decision would be binding in case of disagreement. ***Richco Structures***, 82 Wis. 2d at 550. At issue was the failure of this third neutral arbitrator to fully disclose his relationship with the parties. ***Id.*** at 550-51. Observing that the two party-selected arbitrators "by design" effectively were representatives of the respective parties, the court limited its construction of "evident partiality" to the arbitrator intended by the parties to be neutral. ***Id.*** at 557. The court held that this neutral arbitrator must fully disclose at the outset the relationships he or she has with the parties or their representatives and that "evident partiality" includes proof of failure to do so. ***Id.*** at 558-59. The court then set out a test for determining whether an award should be vacated under this standard. The test is whether a reasonable person, upon learning the previously undisclosed information, would have had such doubts about the impartiality of the arbitrator that the person would have taken action on the information. ***Id.*** at 562.

Nondisclosure also was the issue in ***DeBaker***. There, an outside body appointed all three arbitrators. ***DeBaker***, 194 Wis. 2d at 109. One arbitrator did not disclose that sometime earlier he had received political campaign contributions from one of the law firms, though not from the particular attorneys, representing one of the parties. ***Id.*** at 110. The circuit court vacated the award, and the court of appeals affirmed on grounds that nondisclosure of the contributions constituted evident partiality. ***Id.*** at 111. The supreme court reversed, however, because the challengers failed under the ***Richco Structures*** reasonable person test to show by clear and convincing evidence "that a reasonable person would conclude it clear, plain, and apparent from the undisclosed information that partiality is so likely that action was required." ***DeBaker***, 194 Wis. 2d at 118.

Borst asserts that objective bias, such as that suggested by Hills' professional affiliation with Allstate, sufficiently establishes "evident partiality." He relies primarily on ***Diversified Management***, 119 Wis. 2d 441, for its express rejection of the "modern view" that arbitrators are expected to be biased in favor of the choosing party and its statement that both state and federal law indicate a legislative intent to avoid partisan arbitrators. ***Id.*** at 447-48. Thus, unlike in ***Richco Structures*** and ***DeBaker***, Borst's challenge here stems not from a failure to disclose the relationship, but from the relationship itself. Borst argues that, because ***Diversified Management*** says that *all* arbitrators must be impartial, where partiality is so likely that a party takes action such as he did by objecting to Hills, the "obvious corollary" to the reasonable person test is that the objecting party's request for a new arbitrator must be granted. Allstate replies that Hills disclosed his relationship with Allstate at the outset "and that is all the law requires." Such a

position strikes us as too glib to support the concerns expressed in ***Richco Structures***, ***DeBaker*** and ***Diversified Management***.

We also note, however, that when the United States Supreme Court addressed "evident partiality," it had this to say about disclosure of a relationship and whether disqualification necessarily should flow from it:

> It is often because [arbitrators] are [people] of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function…. [A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance …. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968) (White, J., concurring).

Wisconsin courts have not yet addressed this precise question. They have observed that "evident partiality" must be construed in light of the "clear legislative intent to require disinterested arbitration." ***Richco Structures***, 82 Wis. 2d at 557. The supreme court's construction of the term has been limited, however, to arbitrators intended by the parties to be neutral. ***Id.***; ***DeBaker***, 194 Wis. 2d 109. The court of appeals said statutory law supports impartiality of the entire panel. ***Diversified Mgmt.***, 119 Wis. 2d at 447-48. The question, therefore, is what a party is entitled to under Wisconsin law when he or she objects to another party's named arbitrator for reasons of partiality at the beginning of or during the arbitration process. Is disclosure all a party can expect until the award is made, at which time it can be challenged pursuant to WIS. STAT. § 788.10(1)(b), or, absent an express agreement to the contrary, is each of the arbitrators presumed

to be neutral such that an objection based on partiality may require naming a new arbitrator?

b. Discovery

The second issue involves the nature and extent of discovery permitted during the arbitration process. Both parties direct our attention to WIS. STAT. § 788.07, which provides:

> **Depositions.** Upon petition, approved by the arbitrators or by a majority of them, any court of record in and for the county in which such arbitrators, or a majority of them, are sitting may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons as provided by law for the taking of depositions in suits or proceedings pending in the courts of record in this state.

Borst asserts that the statute demonstrates a clear legislative intent to not authorize unfettered discovery in arbitration because these depositions must be court approved and expressly are "to be used as evidence." ***Id.*** Furthermore, he argues that by specifying depositions, the legislature deliberately omitted "interrogatories, requests for production and the like." Allstate counters that discovery parameters lie within the discretion of the arbitration panel. It reasons that (1) since this statute permits arbitrators to authorize depositions, other forms of discovery impliedly also are within their discretion; and (2) the parties here were contractually bound by American Arbitration Association (AAA) rules, which grants to the arbitrators the right to direct discovery.[5]

[5] Borst contends the rules Allstate supplied do not apply because (1) other rules were in effect at the time Borst requested arbitration, and (2) the parties did not file a submission with the AAA but proceeded according to the alternative procedure in the "If We Disagree" provision of the Allstate policy.

WISCONSIN STAT. ch. 788 does not lay out precise parameters for conducting arbitration. Rather, various sections refer to the parties' agreement or the arbitration clause in the parties' contract. *See, e.g.*, WIS. STAT. §§ 788.01, 788.02, 788.03. An arbitration agreement generally affords arbitrators broad authority to devise such procedures as are necessary to reach a decision, as long as those procedures are compatible with the contract language and are not contrary to law. *See* ***Employers Ins. of Wausau v. Certain Underwriters at Lloyd's of London***, 202 Wis. 2d 673, 686, 552 N.W. 2d 420 (Ct. App. 1996) (stating that it is the province of the arbitration panel, as the interpreter of the arbitration contract's language, to devise such procedures as necessary to reach a decision, as long as those procedures are compatible with the contract language and do not violate the law). The absence of a precise statutory scheme for discovery during the arbitration process may reflect the concept that arbitration is intended as an expedient, more private alternative to litigation. We question whether it also indicates a legislative recognition that the process works most optimally when parties structure clear arbitration contracts, and an intent to defer to arbitrators a determination of how best to implement those contractually fashioned dispute resolution plans.

c. State Bar ADR Section Amicus Brief

Upon invitation of the court of appeals, the Alternative Dispute Resolution (ADR) Section of the Wisconsin State Bar submitted an amicus curiae brief. The ADR Section took no position on the facts or resolution of the case, but simply proposed recommendations for arbitrator standards and scope of discovery.

The ADR Section noted that in some instances parties intend their appointed arbitrator to be neutral, while in others they intend an advocate. To

avoid courts having to discern the parties' intent on a case-by-case basis, the ADR Section recommends establishing a presumption of impartiality of all arbitrators as the preferred role, absent explicit agreement by all parties to the contrary. The Section asserts that a presumptive impartiality rule would reduce the frequency of process-related disputes that may arise simply out of disappointment with the result and would force "sophisticated commercial parties" to set clearer ground rules before submitting disputes to arbitration.

As for discovery, the ADR Section proposes that limitations be governed by the parties' contract and, if the contract is silent, by the arbitrators' inherent authority. It urges parties to explicitly address discovery procedures in their arbitration contract, or to reference a set of rules specifying how discovery will be handled. Absent contractual provisions, arbitrators should be given wide latitude to fashion the discovery process. The Section recommends that judicial intervention be limited to only what is necessary to assure fundamental fairness.

CONCLUSION

Wisconsin encourages arbitration as an expedient, less expensive, more private alternative to litigation. Given its growth in popularity and due to the current coexistence of party-appointed advocates and neutral arbitrators, these issues are certain to reoccur with increasing frequency. Clear standards defining the role of arbitrators and the extent of their authority would eliminate the need for court intervention, thus fostering uniformity and confidence in the arbitration process. Because these policy questions are best answered by our state's highest court, we respectfully certify this appeal to the Wisconsin Supreme Court.