COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1500 **Cir. Ct. No. 2007CV2560**

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

NORRIS PEGUES,

PLAINTIFF-APPELLANT,

V.

PROGRESSIVE NORTHERN INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES AND MANAGED HEALTH SERVICES INSURANCE CORP.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Norris Pegues appeals from a judgment confirming an arbitration decision in favor of his automobile insurer, Progressive Northern Insurance Company. We affirm because we agree that Progressive's spoliation of Pegues' van was not intentional or egregious and that Pegues is judicially estopped from challenging as unconscionable the arbitration provision he earlier invoked.

¶2 On December 17, 2003, Pegues, a Wisconsin resident, was seriously injured in a motor vehicle rollover accident while on business in Pennsylvania. Pegues initially told the police and healthcare providers that he lost control of his van on the icy road. Pegues later claimed that he lost control after a tailgating semi bumped him from behind. The allegation of a second vehicle implicated the uninsured motorist (UM) coverage in Pegues' policy of insurance with Progressive. The phantom vehicle never was located.

¶3 In May 2004, Progressive denied UM coverage based on its expert's opinion that Pegues' vehicle had made no contact with another. Days later, Progressive commenced a declaratory judgment action seeking a determination of rights under the policy. Pegues timely invoked the policy's arbitration clause and the circuit court dismissed the declaratory action. Progressive appealed, the court of appeals affirmed and the matter proceeded to arbitration.

¶4 Meanwhile, Progressive had taken steps to secure Pegues' van due to his claim of contact by a semi. After its expert examined and photographed the van, Progressive had the vehicle shrink-wrapped and segregated at a Pennsylvania salvage yard pending transport to Wisconsin. In early April 2004, Progressive's Pennsylvania claims office mistakenly released the van for sale. Progressive's efforts to recoup the van failed, and it was repaired, destroying its evidentiary value, before it could be retrieved. Pegues sought sanctions against Progressive

for spoliation of evidence. The arbitration panel ruled that sanctions were warranted and barred Progressive from presenting lay or expert testimony or any other evidence that in any way referenced the van's post-accident condition.

¶5 A year later, the arbitration panel ruled on the merits. The panel was unanimous in its conclusion that the accident occurred due to icy conditions, not a phantom vehicle, and that Pegues' damages were approximately $1.3 million. While the panel confirmed its earlier decision regarding spoliation, it found that Progressive's conduct was not egregious or intentional. The panel majority wrote:

> Consul [sic] for Norris maintains that our finding therefore must begin with the assumption that the production of the van for inspection would have yielded evidence detrimental to the position of Progressive. In short[,] to find that an examination of the van would have found evidence of contact with the phantom (semi) vehicle.
>
> The panel unanimously agrees that if, in fact, that were a legal mandate, our finding on liability would have to be reversed. [Two arbitrators] do not agree with Norris' position. ([The third arbitrator] does so agree and authors a dissenting opinion herein. A review by the circuit court may be requested).
>
> Norris relies on ***Insurance Co. of N. America v. Cease Elec.***, 2004 WI App 15, [¶]16, 269 Wis. 2d 286, 674 N.W.2d 886[:]
>
> > "Spoliation remedies advance truth by assuming that the destroyed evidence would have hurt the party responsible for the destruction of evidence and act as a deterrent by eliminating the benefits of destroying evidence."
>
> Norris is incorrect. He would … elevate the word "assumption" to the level of a "presumption." In legal parlance a "presumption" is a term used by the Legislature and/or the Supreme Court to shift a burden of proof. An "assumption" cannot rise to that level. Also, in this case the panel has not found intentional or egregious conduct herein on the part of Progressive.

¶6 As a result, the UM coverage was not triggered, and Pegues' recovery was limited to $25,000. Pegues then commenced this action to have the circuit court vacate the arbitrators' decision pursuant to WIS. STAT. § 788.10 (2007-08).[1] He claimed the decision represented a manifest disregard of spoliation law; the award was procured through undue means; public policy demanded vacation of the award; and the policy's arbitration clause was ambiguous and unconscionable. Progressive moved to confirm the decision pursuant to WIS. STAT. § 788.09. The circuit court issued a written decision, decided upon briefs, confirming the arbitration panel's decision. Pegues appeals.

¶7 Pegues resurrects the same four issues on appeal. We treat the first three together because, essentially, they attack the arbitrators' decision as to the spoliation sanction. In other words, the manifest disregard, undue means and public policy arguments all boil down to Pegues' claim that the panel was required to apply a presumption that the lost evidence would have favored him. The fourth issue challenges the arbitration clause itself.

¶8 Our review of an arbitration award is highly deferential to the arbitrators. ***Steichen v. Hensler***, 2005 WI App 117, ¶12, 283 Wis. 2d 755, 701 N.W.2d 1. The award comes before us "clothed with a presumption that it should be confirmed." ***Id.***, ¶13 (citation omitted). Our role is limited to assuring that the parties receive the arbitration they contracted for, whether or not the result is correct as a matter of law or fact. *See* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis. 2d 576, 585-86, 425 N.W.2d 8 (1988). We will vacate or modify the arbitration award only if perverse misconstruction or positive

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

misconduct is plainly established, there is a manifest disregard of the law, or if the award is illegal or violates strong public policy. *See* ***Employers Ins. of Wausau v. Certain Underwriters at Lloyd's London***, 202 Wis. 2d 673, 687, 552 N.W.2d 420 (Ct. App. 1996); *see also* WIS. STAT. §§ 788.10, 788.11.

¶9 Pegues argues that the arbitrators' decision represents a manifest disregard of spoliation law because the panel recognized but refused to apply "the mandated assumption/inference/presumption" that the van's production would have yielded evidence detrimental to Progressive. *See* ***City of Madison v. Local 311, Int'l Ass'n of Firefighters***, 133 Wis. 2d 186, 191, 394 N.W.2d 766 (Ct. App. 1986) ("Manifest disregard of the law" means that the arbitrators understood and correctly stated the law but ignored it.). As noted, the panel rejected Pegues' argument to the arbitration panel that he was entitled to a favorable presumption under ***Cease Electric*** because an "assumption" does not rise to the level of a "presumption."

¶10 Here on appeal, Pegues turns to ***Estate of Neumann v. Neumann***, 2001 WI App 61, ¶81, 242 Wis. 2d 205, 626 N.W.2d 821, where the court remarked that the spoliation inference derives from the maxim *omnia praesumuntur contra spoliatorem*, or "All things are presumed against a despoiler or wrongdoer." A simple observation about the phrase's Latin derivation does not persuade us that the panel showed manifest disregard for spoliation law or that Pegues is entitled to a spoliation inference that the destroyed evidence would have been unfavorable to Progressive. Indeed, the ***Neumann*** court makes clear that Wisconsin reserves the maxim's operation "for deliberate, intentional actions and not mere negligence" and that an inference is improper absent clear, satisfactory and convincing evidence of intentional destruction. ***Id.***, ¶82.

¶11 Whether to impose sanctions for spoliation of evidence at all and what sanctions to impose are matters committed to the judicial body's discretion, here the arbitration panel. *See* ***Garfoot v. Fireman's Fund Ins. Co.***, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). A finding of egregious conduct in an evidence destruction case involves more than negligence; it consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process. ***Id.*** at 719. If evidence destruction is found to be egregious, dismissal may be a proper sanction. *See* ***id.*** at 724.

¶12 From there, Pegues argues the presumption he seeks is reasonable because it is far less harsh a penalty than the dismissal ***Garfoot*** authorizes for egregious spoliation. His logic is flawed, though, because the sanction of dismissal is proper only for egregious conduct, *see* ***id.***, and the panel here found that Progressive's conduct was not egregious, but negligent. Pegues either glosses over or tries to revisit that determination, arguing that a spoliation inference instruction is proper "[w]here there is *clear and convincing evidence that the spoliator acted egregiously*." (Emphasis Pegues'.) We do not review the evidence to decide if it constitutes a preponderance for or against the arbitrators' decision, nor do we disturb the arbitrators' judgment on weight, credibility or competency of evidence. ***Madison Teachers, Inc. v. Madison Metro. Sch. Dist.***, 2004 WI App 54, ¶20, 271 Wis. 2d 697, 678 N.W.2d 311.

¶13 While we do not weigh the evidence, we note that numerous entries in the record catalog Progressive's efforts to segregate the van and document and preserve its post-accident condition pending transport to Wisconsin. Through an apparent communication misstep between the Pennsylvania and Wisconsin claims offices, the van evidently got put back into the general mix of vehicles at the salvage lot where it was being stored and was sold. Progressive's efforts to

retrieve the van were unsuccessful. Even if we thought the panel's determination as to negligence, rather than egregiousness, was error, we may not reverse the arbitration decision for simple error. *See* ***id.***

¶14 Pegues nonetheless asks us to infer that Progressive's delay in bringing this information to light reveals a conscious attempt to influence the outcome of the litigation or a flagrant knowing disregard of the judicial process. The evidence of record is to the contrary. Furthermore, even were we to conclude it is a reasonable inference, it is not the only reasonable inference, nor is it the one the panel adopted. It is the function of the panel, sitting as the factfinder, to determine which inferences to draw. *See* ***Garfoot***, 228 Wis. 2d at 724-25.

¶15 Pegues also attacks the award as having been procured through "undue means." *See* WIS. STAT. § 788.10(1)(a). "Undue means" contemplates an attempt to influence the arbitrators through inappropriate, unjustified or improper methods, *see* ***City of Manitowoc v. Manitowoc Police Dept.***, 70 Wis. 2d 1006, 1019, 236 N.W.2d 231 (1975), along the lines of corruption or fraud.[2] Because this prong of the statute requires that "the award was procured by" corruption, fraud or undue means, logically there must be a nexus between the impropriety and the resulting decision. *See* ***Environmental Barrier Co. v. Slurry Sys., Inc.*** 540 F.3d 598, 608 (7th Cir. 2008) (construing 9 U.S.C. §10(a)(1) of the Federal Arbitration Act (FAA) (2007)); *see also* ***Flexible Mfg. Sys. Pty., Ltd. v. Super***

[2] An arbitration award must be vacated "[w]here the award was procured by corruption, fraud or undue means." WIS. STAT. § 788.10(1)(a). The meaning of a general phrase following the enumeration of specific classes is limited to things of the same kind, class, character or nature as those enumerated. ***Cheatham v. State***, 85 Wis. 2d 112, 118, 270 N.W.2d 194 (1978) (citation omitted).

Prods. Corp., 86 F.3d 96, 99 (7th Cir. 1996) (stating that the language of § 788.10 and 9 U.S.C. §10 of the FAA are "virtually identical").

¶16 Pegues has not established this critical link. He acknowledges that his counsel learned of the evidence destruction in September 2004. Vigorous discovery and briefing ensued and in February 2006 the panel agreed that spoliation had occurred, warranting sanctions. More briefing followed; the panel rendered its decision on the merits in February 2007. Given the panel's full knowledge of the chain of events, Pegues simply does not show how the award "was procured by" Progressive's alleged undue means.

¶17 Drawing another arrow from the same quiver, Pegues next raises a public policy challenge to the spoliation sanction the panel saw fit to impose. He asserts that public policy demands that we vacate the award because not to would condone Progressive's egregious, intentional conduct. Again, the arbitration panel determined that Progressive's conduct was not egregious or intentional. Pegues does not assert error in the arbitration process. Therefore, regardless of whether or not the panel's decision was correct as a matter of fact or of law, the parties must live with the arbitration result, since arbitration is what they contracted for, and that is what they got. *See* ***Madison Police Ass'n***, 144 Wis. 2d at 586.

¶18 Pegues' last claim is that the arbitration clause in the Progressive policy is unconscionable and that he should be relieved of the decision and allowed a jury trial. We agree with Progressive and the circuit court that Pegues is judicially estopped from raising this issue because it was he who invoked the arbitration clause in the first instance.

¶19 Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings.

State v. English-Lancaster, 2002 WI App 74, ¶18, 252 Wis. 2d 388, 642 N.W.2d 627. For it to apply, the earlier and later positions must be clearly inconsistent; the party to be estopped must have succeeded below in selling its position to the court; and the facts at issue must be the same. ***Van Deurzen v. Yamaha Motor Corp. USA***, 2004 WI App 194, ¶5, 276 Wis. 2d 815, 688 N.W.2d 777.

¶20 Pegues' current contention that the arbitration provision is unconscionable clearly contradicts his earlier position when he invoked it. He also convinced the circuit court, over Progressive's objection, to dismiss the case in favor of arbitration and then prevailed on appeal. Pegues suggests the facts are different when, in a footnote, he reminds us that he learned of the spoliation only after he invoked the arbitration clause. We miss his point. The language of the provision remains unchanged. He does not explain how later-acquired facts render the unaltered provision unconscionable if it was not unconscionable when he invoked it. Except for that footnote, his entire argument is that the arbitration provision is substantively unconscionable because it unfairly favors Progressive, the drafter, who offered it without negotiation on a "take-it-or-leave-it" basis. Pegues might have selected a different strategy had he possessed all of the facts, but that does not make the provision intrinsically unconscionable. He is estopped from pursuing that position.

By the Court.—Judgment affirmed.

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