COMPREHENSIVE ORTHOPAEDICS AND MUSCULOSKELETAL CARE, LLC, ET AL. *v.* ALFREDO L. AXTMAYER ET AL.
(SC 18304)

Rogers, C. J., and Norcott, Katz, Palmer, Zarella, McLachlan and Quinn, Js.*

Argued April 28—officially released October 20, 2009

Dominic Fulco III, with whom were *Robert J. Durbin*, and, on the brief, *Maurice T. FitzMaurice* and *Edward F. Spinella*, for the appellants (plaintiffs).

Michael F. O'Connor, with whom were *Scott R. Ouellette* and, on the brief, *James G. Williams*, for the appellees (defendants).

Opinion

McLACHLAN, J. The sole issue on appeal is whether the arbitrator exceeded his authority in declining to award attorney's fees pursuant to the parties' arbitration agreement. The plaintiffs, Comprehensive Orthopaedics and Musculoskeletal Care, LLC (Comprehensive), and certain physician members of Comprehensive,[1] appeal[2] from the judgment of the trial court, which denied the plaintiffs' motion to vacate in part the arbitration award pursuant to General Statutes § 52-418 (a) (4),[3] because it concluded that the arbitrator did not exceed his authority by determining that Comprehensive did not "prevail" on its underlying restrictive covenant claim. On appeal, the plaintiffs claim that the arbitrator exceeded his authority by declining to award attorney's fees because Comprehensive "prevailed" under Connecticut law on its underlying claim, and, therefore, the arbitration agreement required the arbitrator to award attorney's fees. The defendants, Alfredo L. Axtmayer (Axtmayer) and Alfredo L. Axtmayer, M.D., P.C., claim that the award was proper because the arbitrator's determination that Comprehensive did not prevail is not reviewable. We agree with the defendants, and, accordingly, affirm the judgment.

Axtmayer, a physician, was employed by the plaintiffs pursuant to an employment agreement (agreement). Section 11 of the agreement contains a restrictive covenant that prohibits Axtmayer from competing with Comprehensive or disrupting any of its business relationships for a period of three years subsequent to the termination of Axtmayer's employment. The restrictive covenant's terms apply to various towns in the state and, in addition, prohibit Axtmayer from maintaining a business relationship with various Connecticut hospitals outside of the restricted territories.[4] Section 11 (e) of the agreement requires Axtmayer to pay a liquidated damages award of $150,000 if he violates the terms of the covenant. Section 11 (d) of the agreement, however, provides that "[i]n the event the provisions of [§] 11 are deemed to exceed the time, geographic, or occupational limitations permitted by applicable law, then such provisions shall be automatically reformed to the maximum time, geographic or occupational limitations permitted by applicable law." At some point during the employment period, the plaintiffs terminated Axtmayer.

Subsequently, the parties entered into an arbitration agreement to submit various issues arising from the employment relationship, including the question of whether Axtmayer had violated the terms of the restrictive covenant.[5] In that submission, the parties agreed that "[a]s to [§] 11 of the . . . [a]greement . . . the [a]rbitrator shall award attorney's fees and costs only to [Comprehensive] and only if [Comprehensive] prevails in its claims under [§] 11 of the . . . [a]greement." The parties further agreed that the arbitrator's award

could only be vacated on the basis of the grounds set forth in § 52-418. After the presentation of testimony and evidence, the arbitrator found that Axtmayer had "established his solo, competitive practice within the restrictive territory almost immediately after his ouster." Moreover, the arbitrator found that Axtmayer had continued to have a business relationship with many of the medical institutions covered by the restrictive covenant. Although the arbitrator found that those facts weighed in favor of enforcing the covenant, the arbitrator concluded that the time, geographical and occupational limitations imposed by the covenant were excessive. Accordingly, pursuant to the automatic reformation provision in the agreement, the arbitrator reformed the covenant's restrictions[6] and reduced the liquidated damages to $75,000 from $150,000. With respect to attorney's fees, the arbitrator concluded that "[i]n view of the reformation, no attorney's fees and costs are awarded to [Comprehensive]."

On February 4, 2008, the plaintiffs filed an application with the Superior Court to vacate the award only with respect to the arbitrator's decision not to award attorney's fees. The plaintiffs claimed that the arbitrator exceeded his authority because the arbitration agreement provided that "the [a]rbitrator shall award attorney's fees and costs . . . if [Comprehensive] prevails in its claims under [§] 11 . . . ." On March 3, 2008, the defendants filed an application to confirm the arbitrator's decision and award. On March 26, 2008, the trial court denied the plaintiffs' application to vacate in part. The trial court concluded that the submission to arbitration was unrestricted and that the arbitrator had the authority to fashion any remedy that was rationally related to a plausible interpretation of the agreement. Accordingly, the trial court concluded that, in light of the arbitrator's reformation of the restrictive covenant, the arbitrator reasonably could have concluded that Comprehensive did not prevail on its claims and, therefore, was not entitled to attorney's fees. On April 14, 2008, the trial court granted the defendants' application to confirm the award.[7] This appeal followed.

"Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. . . .

"Even in the case of an unrestricted submission, we have . . . recognized three grounds for vacating an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of § 52-418. . . . [Section] 52-418 (a) (4) provides that an arbitration award shall be vacated if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

"In our construction of § 52-418 (a) (4), we have, as a general matter, looked to a comparison of the award with the submission to determine whether the arbitrators have exceeded their powers." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80–81, 881 A.2d 139 (2005). The standard for reviewing a claim that the award does not conform to the submission requires what we have termed " 'in effect, de novo judicial review.' " Id., 84. "Although we have not explained precisely what 'in effect, de novo judicial review' entails as applied to a claim that the award does not conform with the submission . . . [o]ur inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred." Id., 85.

"In determining whether an arbitrator has exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator correctly interpreted the contract. The court must instead focus on whether the [arbitrator] had authority to reach a certain issue, not whether that issue was correctly decided. Consequently, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced. The arbitrator's decision cannot be overturned even if the court is convinced that the arbitrator committed serious error."[8] (Internal quotation marks omitted.) Id., 86 n.7, quoting 1 M. Domke, Commercial Arbitration (3d Ed. 2003) § 39:6, pp. 39-12 through 39-13. Moreover, "[e]very reasonable presump-

tion and intendment will be made in favor of the award and of the arbitrator's acts and proceedings. Hence, the burden rests on the party challenging the award to produce evidence sufficient to show that it does not conform to the submission." *Bic Pen Corp.* v. *Local No. 134*, 183 Conn. 579, 585, 440 A.2d 774 (1981).

"Such a limited scope of judicial review is warranted given the fact that the parties voluntarily bargained for the decision of the arbitrator and, as such, the parties are presumed to have assumed the risks of and waived objections to that decision. . . . It is clear that a party cannot object to an award which accomplishes precisely what the arbitrators were authorized to do merely because that party dislikes the results." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 110, 779 A.2d 737 (2001).

In the present case, we conclude that the arbitrator's decision not to award attorney's fees conformed to the submission, and, accordingly, that the arbitrator did not exceed his authority. At the outset, it is helpful to distinguish this case from cases in which we have vacated an arbitration award on the ground that the arbitrator exceeded his authority. In the leading case of *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 99–100, we determined that the arbitrator's award of double damages conformed to the submission, but that his award of attorney's fees did not conform to the submission, and therefore, that he had exceeded his authority with respect to that award. We reached differing results on the basis of the scope of the submission. In *Harty*, the submission asserted that " 'it is understood and agreed that the arbitrators are not authorized or entitled to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages regardless of the nature or form of the claim or grievance that has been submitted to arbitration . . . .' " Id., 76. With respect to double damages, we concluded that because "the submission's limitation on an award of 'punitive damages,' or 'damages in the nature of punitive damages,' is ambiguous with respect to whether the contract provision was designed to exclude . . . double damages"; id., 98; the arbitrator's award could not be deemed outside the scope of the submission, in effect, because he was " 'arguably construing' " the contract. Id., 99; see also *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision").

In contrast, with respect to the award of attorney's fees, because "attorney's fees and costs provide the

same relief and serve the same function as would be afforded by common-law punitive damages," that award did not conform to the submission's express prohibition as to those types of damage awards. *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 99–100. Likewise, in other cases, our determination that an arbitrator has exceeded his authority has been premised on similar circumstances in which the arbitrator's award included items that were not submitted to, or outside the scope of, the arbitration. See *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 288 Conn. 223, 232, 951 A.2d 1249 (2008) (award conferred remedy to nonparties); *Board of Education* v. *AFSCME*, 195 Conn. 266, 273, 487 A.2d 553 (1985) (award granted on basis of document outside scope of collective bargaining agreement; submission expressly prohibited such review); *Waterbury Construction Co.* v. *Board of Education*, 189 Conn. 560, 563, 457 A.2d 310 (1983) (award determined, in part, on basis of item parties had not submitted to arbitration); *Local 63, Textile Workers Union* v. *Cheney Bros.*, 141 Conn. 606, 616, 109 A.2d 240 (1954) (award included reduction of base pay rates despite fact that issue of base pay rates not submitted to arbitration), cert. denied, 348 U.S. 959, 75 S. Ct. 449, 99 L. Ed. 748 (1955).

In the present case, there were two possible awards with respect to the submission regarding the plaintiffs' restrictive covenant claim. If the arbitrator determined that Comprehensive had prevailed, then the submission required the award of attorney's fees. If, on the other hand, the arbitrator determined that Comprehensive did not prevail, the submission did not permit the award of attorney's fees. So long as the arbitrator rendered one of these two possible awards, we cannot say that the award did not conform to the submission. Whether Comprehensive "prevailed" was a question uniquely for the arbitrator. Although the arbitrator awarded the plaintiffs $75,000 in liquidated damages, he determined that the terms of the original covenant were excessive, and in view of his reformation, the arbitrator declined to award attorney's fees—implicitly concluding that Comprehensive did not prevail on its claim. It is irrelevant whether we would reach the same conclusion that the arbitrator reached or even whether the arbitrator correctly interpreted the agreement. *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 86 n.7 ("a court cannot base the decision on whether the court would have ordered the same relief, or whether or not the arbitrator correctly interpreted the contract" [internal quotation marks omitted]); *Bridgeport* v. *Bridgeport Police Local 1159*, 183 Conn. 102, 106, 438 A.2d 1171 (1981) ("[i]f a submission is unrestricted, the arbitrators are not required to decide the issues according to law and the award cannot be reviewed for errors of law or fact").[9]

In short, the question comes down to whether the

arbitrator had the authority to reach the issue, not whether the issue was correctly decided. We reiterate that "[w]here the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous." (Internal quotation marks omitted.) *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 93, 868 A.2d 47 (2005).[10] In arguing that the trial court improperly declined to review the arbitrator's determination de novo, the plaintiffs fail to recognize this distinction. That is, our standard of " 'in effect, de novo judicial review' "; *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 84; relates to whether the parties have vested the arbitrator with the *authority* to decide the issue, not de novo review of whether the arbitrator correctly *decided* the issue. As we have noted, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, the award must be enforced." (Internal quotation marks omitted.) Id., 86 n.7. In short, because the award conformed to the submission, the arbitrator did not exceed his authority.

The dissent's focus, like the plaintiffs', on whether the arbitrator correctly determined that Comprehensive "prevailed" is misplaced. Such a query focuses not on whether the arbitrator exceeded his authority, but on whether the arbitrator was wrong on a legal or factual issue. In attempting to demonstrate the arbitrator's error, the dissent engages in the expanded scope of judicial review that our law expressly prohibits, namely, review of the arbitrator's factual and legal conclusions. See, e.g., *Bridgeport* v. *Bridgeport Police Local 1159*, supra, 183 Conn. 106 ("award cannot be reviewed for errors of law or fact"); see also *Moore* v. *First Bank of San Luis Obispo*, 22 Cal. 4th 782, 788, 996 P.2d 706, 94 Cal. Rptr. 2d 603 (2000) (arbitrator's failure to designate prevailing party constituted error of law and "[e]ven if legally erroneous, such an arbitral decision as to who, if anyone, prevailed . . . [was] not . . . reviewable"). More importantly, expanded judicial review is contrary to our well settled and deferential policy favoring arbitration. See, e.g., *Hottle* v. *BDO Seidman, LLP*, 268 Conn. 694, 708, 846 A.2d 862 (2004) (Arbitration is "well recognized as an effective and expeditious means of resolving disputes between willing parties desirous of avoiding the expense and delay frequently attendant to the judicial process . . . . Thus, [i]t has long been the policy of the law to interfere as little as possible with the freedom of consenting parties to achieve that objective . . . ." [Internal quotation marks omitted.]); *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 258 Conn. 110 (goal of arbitration is efficient, economical and expeditious resolution of private disputes); *Caldor, Inc.* v. *Thornton*,

191 Conn. 336, 345 n.6, 464 A.2d 785 (1983) ("[b]ecause of the public policy favoring expeditious dispute resolution in the informal context of arbitration rather than in the more formal, time-consuming and expensive context of ordinary litigation, we have always respected the autonomy of the arbitration process and the attendant authority to decide questions of law and fact consistent with the submission"), aff'd, 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985); *Gores* v. *Rosenthal*, 150 Conn. 554, 558, 192 A.2d 210 (1963) ("Arbitration may or may not be a desirable substitute for trials in courts . . . [b]ut when [the parties] have adopted it, they must be content with its informalities . . . . They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery." [Internal quotation marks omitted.]), quoting *American Almond Products Co.* v. *Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (L. Hand, J.). If we were to adopt the dissent's expanded role of judicial review of arbitrators' conclusions of law or fact, we would eviscerate the very purpose of arbitration—efficient, economical and expeditious resolution of private disputes with limited judicial intrusion—and thereby render arbitration more akin to a full-blown judicial proceeding with its attendant increase in costs and time. See *Moncharsh* v. *Heily & Blase*, 3 Cal. 4th 1, 28, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992) (review of arbitrator's errors of law or fact "would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers"). We decline to expand our scope of judicial review to an arbitrator's conclusions of law and fact.

The simple but essential distinction between this case and *Harty* is as follows. In *Harty*, the arbitrator expressly lacked authority to award attorney's fees because they were precluded by the submission, which stated "the arbitrators are not authorized or entitled to include as part of any award . . . punitive damages . . . ." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 76. The award included attorney's fees, which, in Connecticut, are an element of punitive damages. Here, the arbitrator was authorized to award attorney's fees only if he found that Comprehensive prevailed on its restrictive covenant claim. Of course, implicit in that authorization is another, more fundamental authority granted to the arbitrator. The submission granted him the authority to decide whether Comprehensive prevailed. Regardless of whether his implicit conclusion that Comprehensive did not prevail was legally correct, it is undisputed that he had the authority to make the determination. Moreover, even if that determination was not legally correct, we do not have the authority to review an error of law. Id., 85. Accordingly, the arbitrator did not exceed

his authority in concluding that Comprehensive did not prevail, and the award conformed to the submission in this case, whereas in *Harty* it did not.

The judgment is affirmed.

In this opinion NORCOTT, ZARELLA and QUINN, Js., concurred.

* This case originally was argued before a panel of this court consisting of Justices Norcott, Katz, Palmer and McLachlan and Judge Quinn. Thereafter, the court, pursuant to Practice Book § 70-7, sua sponte, ordered that the case be considered en banc. Accordingly, Chief Justice Rogers and Justice Zarella were added to the panel, and they have read the record, briefs and transcript of oral argument.

[1] In addition to Comprehensive, the plaintiffs include Paul H. Zimmering, Jeffrey Pravda, Robert Dudek, Leonard Kolstad, Ronald Paret and Robert Biondino. We refer to the plaintiffs individually by name where necessary and collectively as the plaintiffs.

[2] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects . . . (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[4] The covenant set forth a restricted territory comprised of Cheshire, Wallingford, Meriden, North Haven, Northford, Southington, Durham, Hamden, Middlefield, Kensington and Berlin, and prohibited Axtmayer from maintaining a relationship with Veteran's Memorial Medical Center, Hartford Hospital, University of Connecticut Health Center, Charlotte-Hungerford Hospital, Hospital of St. Raphael, Yale-New Haven Hospital and Bradley Memorial Hospital.

[5] The arbitration agreement provides that the parties "have agreed to submit to binding arbitration any and all issues or claims that they have against each other in order to, among other reasons, reach an expedited resolution of their claims and reduce their expenses . . . ." The parties submitted claims that arose out of Axtmayer's employment and subsequent termination including breach of contract, breach of fiduciary duty and bad faith, and claims that arose out of a lease of premises between the two parties.

[6] The arbitrator did not articulate the parameters of the new restrictions set forth on the basis of his reformation.

[7] On April 11, 2008, the plaintiffs filed a motion to reargue, but that filing was incomplete and was returned to the plaintiffs. The plaintiffs filed a proper motion on April 25, 2008, which was beyond the twenty day period in which to file a timely motion to reargue. On June 11, 2008, the trial court issued a memorandum of decision in which it granted the plaintiffs' motion to reargue but denied the requested relief. In that memorandum, the court rejected the plaintiffs' new contention that the submission was restricted and stated that even if the submission was restricted, the arbitrator was within his authority to "resolve 'any and all claims [the parties] have against each other.' "

[8] This directive is distinguishable from a "manifest disregard" analysis. In *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 85, we clarified that a claim that an arbitrator has exceeded his authority may be established by showing that an award failed to conform to the submission, or that the arbitrator manifestly disregarded the law. In *Garrity* v. *McCaskey*, 223 Conn. 1, 6, 612 A.2d 742 (1992), we had adopted a three part test to determine whether an arbitrator has manifestly disregarded the law. In the present case, the plaintiffs do not claim error under the manifest disregard standard, and, accordingly, we confine our review to whether the award conformed to the submission.

[9] In support of its assertion that the court may review the arbitrator's conclusions of fact and law with respect to the award of attorney's fees, the dissent principally relies on cases from the intermediate Maryland Court of Appeals. See footnote 6 of the dissent. The rationale underpinning those cases was premised on the decision of *Agnew* v. *Lacey Co-Ply*, 33 Wash. App. 283, 654 P.2d 712 (1982), cert. denied, 99 Wash. 2d 1006 (1983), which the Washington Court of Appeals recently rejected outright in *Morrell* v.

Wedbush Morgan Securities, Inc., 143 Wash. App. 473, 487, 178 P.3d 387 (2008) ("*Agnew* court thereby corrected what it perceived as an arbitrators' legal mistake in a manner that Washington law does not permit"). We, however, find ample support for our conclusion. In *Moore* v. *First Bank of San Luis Obispo*, 22 Cal. 4th 782, 788, 996 P.2d 706, 94 Cal. Rptr. 2d 603 (2000), the arbitrator, despite awarding the plaintiff all the relief he sought, failed to make a finding as to which party had prevailed. Although the plaintiff argued that the arbitrator implicitly designated him as the prevailing party, the court determined that, at most, the arbitrator's failure to designate a prevailing party constituted an error of law, and that "[e]ven if legally erroneous, such an arbitral decision as to who, if anyone, prevailed . . . [was] not . . . reviewable . . . ." See also *DiMarco* v. *Chaney*, 31 Cal. App. 4th 1809, 1815, 37 Cal. Rptr. 2d 558 (1995) (having made finding that party had prevailed, arbitrator compelled to award attorney's fees, but would *not* have been improper if no such finding made).

[10] On appeal, the plaintiffs argue that the arbitration agreement was to be governed by Connecticut law, and that under our law, Comprehensive was the prevailing party. Despite the fact that the arbitration agreement contained a choice of law provision, the plaintiffs cite no authority for the proposition that such a clause compels a particular result when the arbitrator has the authority to determine the factual and legal issues presented. Of course, if the arbitrator had determined an issue on the basis of New York law, for example, despite the clear choice of law provision, such an act likely would form the basis for a colorable "manifest disregard" claim. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, supra, 273 Conn. 95.