

RENDERED: JANUARY 17, 2003; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002005-MR (DIRECT APPEAL)  
AND  
NO. 2001-CA-002068-MR (CROSS-APPEAL)

ORKIN EXTERMINATING COMPANY,  
INC., OF ATLANTA, GEORGIA, a  
Delaware Corporation registered  
in Kentucky and ORKIN EXTERMINATING  
COMPANY, INC., OF BOWLING GREEN,  
KENTUCKY, a Delaware Corporation  
registered in Kentucky

APPELLANTS/CROSS-APPELLEES

v. APPEALS FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 98-CI-00382

STEVE JOINER and  
SAMMIE JO JOINER

APPELLEES/CROSS-APPELLANTS

### OPINION

AFFIRMING IN PART and  
REVERSING IN PART

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

EMBERTON, CHIEF JUDGE. This is an appeal and cross-appeal from an order of the trial court vacating part of an arbitrator's award and, in part, affirming the award.

On April 30, 1979, Earl Joiner and Orkin Exterminating Company, Inc., entered into a contract for the treatment of termites. The contract provided for a lifetime guarantee conditioned on the payment of an annual renewal fee. Earl Joiner died in 1986 leaving the residence to his son, Steve Joiner. After Earl's death, no additional payments were made on the Orkin contract.

In 1988, concerned about potential termite problems at the residence, Steve contacted Orkin which inspected the property and prepared a contract to provide chemical treatment and the installation of ten vents for moisture reduction in the residence's crawl space. Although a contract was prepared and executed, Steve did not make the required payments and no service was rendered.

In March 1995, the Joiners again contacted Orkin regarding possible termite infestation in the residence. On March 16, 1995, the parties executed a contract that contained a re-treatment guarantee providing that in the event of re-infestation, Orkin would re-treat the residence at no additional cost. The contract also contained an exculpatory clause which provided:

In understand that ORKIN's obligation under this Guarantee is limited to re-treatment only. I expressly release ORKIN from any obligations to repair any damage to my building or its contents caused by an infestation of Subterranean Termites or caused by ORKIN's negligence or breach of any other obligations arising hereunder.

Additionally, the 1995 contract, unlike the 1979 contract between Orkin and Earl Joiner, contained an arbitration clause requiring all disputes between the parties to be resolved by mediation, and if unsuccessful, arbitration.

On April 2, 1998, the Joiners filed an action against Orkin alleging breach of the 1988 and 1995 contracts and of the 1975 and 1979 contracts between Orkin and Earl Joiner. They also alleged fraud, misrepresentation, non-disclosure, and negligence. On April 20, 1998, the Joiners filed an amended complaint adding a consumer protection claim against Orkin. The claim, stated in general terms, was without detail as to the specific violation of the Consumer Protection Act.

On July 27, 1998, Orkin filed a motion to compel arbitration arguing that the 1995 contract was binding between the parties and mandated arbitration. The Joiners objected claiming that the 1995 contract was an adhesion contract and that the arbitration clause violated the Consumer Protection Act. No decision was made on the motion until February 2000, when the trial court ordered that:

The parties are bound by the mediation/ arbitration term of the 1995 agreement. The disputes that exist between them must be mediated. The parties shall, immediately, take all necessary steps to mediate/ arbitrate all disputes that exist between them.

A hearing was conducted before an arbitrator who found the 1979 contract between Earl Joiner and Orkin had lapsed, the 1988 contract was never consummated and the only contract in effect between the parties was the 1995 contract. The arbitrator concluded that the 1995 contract was not unconscionable, there was no fraud, and that the waiver of liability provision in the 1995 contract was valid and enforceable. The arbitrator rejected the Joiners' Consumer Protection Act claims. The Joiners recovered nothing against Orkin.

It was at the arbitrator's hearing and in their post-arbitration memorandum that the Joiners first contended that when they contracted with Orkin in 1995, Orkin offered to reinstate the 1979 contract between Orkin and Earl Joiner in exchange for two renewal payments. The Joiners contended that they made two payments and believed the 1979 contract was renewed. They allege that Orkin switched the 1995 contract for the 1979 contract.

Following the arbitrator's decision, the Joiners filed a motion to vacate or modify the report in the Christian Circuit

Court. After Orkin responded, the Joiners proposed to file a second amended complaint raising their "bait and switch" allegation. On August 14, 2001, the trial court denied the motion to vacate except it held that it was not the court's intent that the 2000 order refer all claims to arbitration, and that the Joiners' Consumer Protection Act claims were not issues subject to arbitration.

Orkin appeals that portion of the court's order holding that the Consumer Protection Act claims are not subject to arbitration and the Joiners' appeal that portion affirming the arbitrator's award.

We agree with Orkin that the trial court erred when it held that the issues raised concerning alleged violations of the Consumer Protection Act were not subject to arbitration. The trial court made no written findings regarding its decision to vacate part of the arbitrator's award so we are left to interpret its spoken words. However, it is clear from the dialogue between the court and counsel that its holding was premised on its belief that claims under the Consumer Protection Act were beyond the scope of arbitration. Specifically, when asked by counsel if the judge was taking the position that any consumer claim under the 1995 contract was not proper for arbitration, the judge replied:

JUDGE ATKINS: Yes. Any claim that was couched in terms of the Consumer Protection Act, that it was not my intention that that be part of the arbitrator's responsibility.

The court, both at the time of its 2000 and 2001 orders, did not have the benefit of Conseco Finance v. Wilder.<sup>1</sup> In Conseco, a mobile home purchaser brought a Consumer Protection Act claim against the manufacturer and lender. This court held that claims under the Consumer Protection Act fall within the scope of an arbitration agreement.

As set out above, the Wilders' arbitration agreement with Conseco applies to "all disputes, claims or controversies arising from or relating to this Contract or the parties thereto. . . ." The Wilders' claims against Conseco are all based on Conseco's alleged breach of duties imposed by the contract itself or by statutes—Kentucky's Consumer Protection Act, in particular—that are brought into play by virtue of the contract. The Wilders' claims, therefore, "relate to" the contract and thus are within the scope of the arbitration agreement.

Against the conclusion, the Wilders suggest, and the trial court apparently agreed, that the Consumer Protection Act (CPA) creates an overriding exception to the arbitration act. We are not persuaded, however, that the Wilders have substantiated this suggestion. To be sure, it is within the authority of the General Assembly to override in subsequent legislation the mandate of the UAA. As the Supreme Court has noted, however, in discussing the like power of Congress to override the FAA,

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<sup>1</sup> Ky. App., 47 S.W.3d 335 (2001).

The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purpose.

The Wilders have not met this burden. They have referred us to no express provision of the CPA limiting the effect of the Arbitration Act, and they have advanced no reason to conclude that arbitration is inherently incompatible with the CPA's purposes. Even if the CPA did not create an exception to Kentucky's Arbitration Act, moreover, that exception would have no bearing on Consecoco's federally established rights, for when the FAA applies as we believe it does here, it supersedes incompatible state laws. We conclude therefore that the Wilders' claims come within the scope of their arbitration agreement and that arbitration is to be compelled unless, as the Wilders next assert, the agreement is not to be enforced because it is unconscionable.<sup>2</sup> (Footnote and citations omitted).

The arbitrator properly considered all issues including those arising under the Consumer Protection Act. The trial court erred in holding otherwise.

The Joiners contend that the arbitration clause itself is unconscionable and enforceable. Arbitration agreements are

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<sup>2</sup> Id. at 340-41.

generally favored by the law and there is nothing in the present agreement that is one-sided or oppressive.<sup>3</sup> The Joiners' ignorance of the rules of the American Arbitration Association is not sufficient to render the agreement unenforceable.

The Joiners have compiled a lengthy list of errors allegedly committed by the arbitrator and urge this court to adopt a de novo standard of review. The Joiners have misapplied this court's holding in Conseco, supra, where we did apply a de novo standard of review. On appeal in that case, however, was whether the trial court properly refused to refer the case to arbitration and one where there were no factual findings made by the trial court. KRS<sup>4</sup> 417.160(1) sets forth the instances where a court may vacate an arbitrator's award:

(1) Upon application of a party, the court shall vacate an award where:

(a) The award was procured by corruption, fraud or other undue means;

(b) 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;

(c) The arbitrators exceeded their powers;

(d) The arbitrators refused to postpone the hearing upon

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<sup>3</sup> See Conseco, supra.

<sup>4</sup> Kentucky Revised Statutes.

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; or

(e) 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; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award.

Consistent with the view that an arbitrator's decision will not be set aside for errors of law, such errors are not included in KRS 417.160(1).<sup>5</sup>

The Joiners contend that Carrs Fork, supra, expands the scope of the judicial review of an arbitrator's decision. Carrs Fork involved a 1956 lease which predated the effective date of the Kentucky Uniform Arbitration Act thus, the court was required to apply KRS 417.018 which provided that courts shall have the power over arbitration awards on equitable principles. The court concluded that in rare instances, where an award fails to provide equity so as to produce palpable error, the court may

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<sup>5</sup> Carrs Fork Corp. v. Kodak Mining Co., Ky., 809 S.W.2d 699 (1991).

vacate an arbitrator's award.<sup>6</sup> In that case, the award was found grossly inequitable where the arbitrators ignored the legal maximum that the law abhors a forfeiture.<sup>7</sup>

There have been no reported cases resolving whether palpable error remains as a basis for setting aside an award or is excluded by virtue of KRS 417.160. However, the errors alleged do make it necessary for us to decide the issue since those alleged by the Joiners do not rise to the level of palpable error.

The Joiners contend that the arbitrator erroneously enforced the waiver of liability clause. In Jones v. Hanna,<sup>8</sup> the court held such waivers do not violate public policy and concluded that one may contract away future negligence if such is not willful and wanton, and not resultant in personal injury.<sup>9</sup>

The Joiners also contend that the contract violates the Uniform Commercial Code. This argument was not raised before the arbitrator or the trial court, and therefore, will not be considered by this court.

The remaining issues raised by the Joiners concerning the calculation of damages need no discussion. The arbitrator's

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<sup>6</sup> Id. at 703.

<sup>7</sup> Id. at 701.

<sup>8</sup> Ky. App., 814 S.W.2d 287 (1991).

<sup>9</sup> Id. at 289.

decision that the Joiners are entitled to nothing because of the waiver of liability clause renders the issues moot.

That part of the trial court's order that vacates the arbitrator's award is reversed. In all other respects, the order is affirmed.

ALL CONCUR.

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