STATE OF MICHIGAN

COURT OF APPEALS

ABC PAVING COMPANY,

Plaintiff-Appellee,

v

GIFFELS HOYEM BASSO, INC.,

Defendant-Appellant.

UNPUBLISHED
January 31, 2006

No. 256385
Monroe Circuit Court
LC No. 99-010548-NM

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant Giffels Hoyem Basso, Inc. (Giffels) appeals as of right from a circuit court judgment confirming an arbitration award in favor of plaintiff ABC Paving Company (ABC). Giffels contends that the trial court erred by refusing to vacate the award because the arbitrator exceeded his powers when he failed to apply an indemnity clause. We affirm. We decide this appeal without oral argument.[1]

I. Basic Facts And Procedural History

ABC and Giffels both worked on a construction project for the State of Michigan at the Monroe County Community College. The project required Giffels to install a steam line that Giffels designed. The general contractor, DeMaria Building Company (DeMaria), hired ABC to construct the site work, sewers, and water systems and hired Sieb Plumbing & Heating (Sieb) to install a high pressure/high temperature steam line. The original steam line and a replacement steam line both failed.

According to ABC's complaint, DeMaria paid for the replacement cost of the steam line and then brought a claim against ABC for reimbursement. ABC paid DeMaria $241,840 as the result of a 1999 arbitration proceeding between ABC, DeMaria, and Sieb. ABC then brought this action against Giffels for reimbursement, due to Giffels' alleged negligence in designing the system. Count I of ABC's complaint was titled, "NEGLIGENCE/MALPRACTICE," and Count II, "DAMAGES."

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[1] MCR 7.214(E).

ABC and Giffels stipulated to dismiss the action and refer the case to binding arbitration. The stipulation states, "All claims pending in this action shall be decided in arbitration, with the result of the arbitration proceeding to be final and binding on the parties. . . . The Court shall retain jurisdiction . . . for the purpose of entering a judgment confirming the arbitration award, as provided by MCL 600.5001 *et seq*. and MCR 3.602." Arbitration hearings occurred on three dates in 2003 and 2004.

In the award, the arbitrator explained that the failure in the underground steam conduit system was caused by groundwater entering into the protective cover of the system. The arbitrator then addressed the parties' contentions regarding which entity was responsible for the damage. ABC contended, and the arbitrator agreed, that there were errors in Giffels' design of the system. However, Giffels contended that ABC "breached" the outer protective coating at several points. ABC admitted that it breached the coating at one juncture (the water line crossing, which was purportedly repaired). But with respect to Giffels' assertion that ABC damaged the protective covering at other points, the award states:

> As far as ABC damaging the steam line covering other than at the water line crossing, the photos presented show some damage to the coating north of the 30" storm line which ABC claims was not done by them or in the alternative, if it was done by them it was during the opening up after the first installation for the inspection after the failure. Giffels Hoyem also claims that there was damage done to the protective coating by ABC under the 30" storm line and/or at the proximity of the manhole base slab, cookie, when it was first installed. There was not dispositive evidence of such damage either way, since the photos of the area were not clear and additional damage could be incurred in opening up that crowded space for the inspection after the failure. However, *it is likely that some damage was done by ABC Paving* in the installation of the 30" storm line particularly with the proximity of the manhole as designed by Giffels Hoyem.[2]

The arbitrator ordered Giffels to pay ABC $100,000.

Giffels filed a motion to vacate the arbitration award pursuant to MCR 3.602(J), arguing that the arbitrator failed to consider and address the ramifications of the following indemnification clause in the subcontract agreement between ABC and DeMaria.

> To the fullest extent permitted by law, the Subcontractor [ABC] shall secure, defend, protect, hold harmless and indemnify the Owner, the Contractor [DeMaria] and the Architect [Giffels] and any of their respective agents, servants and employees against any liability, loss, claims, demands, suits, costs, fees and expenses whatsoever, arising from bodily injury, sickness, disease, (including death resulting therefrom), of any persons, or the damage or destruction of any property, including contamination of or adverse effects to property, or loss of use, arising out of or in connection with the performance of any work relating to this

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[2] Emphasis added.

> Subcontract, including extra work assigned to the Subcontractor, based upon any act or omission, negligent or otherwise, of (a) the Subcontractor or any of its agents, employees or servants, (b) any sub/subcontractor, supplier or materialman of the Subcontractor, or any agents, employees or servants thereof, (c) any other person or persons. The obligation of indemnification contained herein shall exclude only those matters in which the claim arises out of allegations of the sole negligence of the Owner, the Architect, the Contractor or any of their respective agents, servants and employees. The obligations herein shall apply to claims which sound in either tort or contract.

The arbitration award did not mention this provision. But Giffels argued that, pursuant to this provision, if ABC's acts or omissions caused damage to the property, ABC must indemnify Giffels against *any* liability, loss, etc., arising from the damage to the property. According to Giffels, because the arbitrator found that ABC damaged the property, ABC must indemnify Giffels and hold it harmless for the $100,000 awarded by the arbitrator plus costs and expenses.

In response to Giffels' motion, ABC argued that Giffels could not rely on the indemnity provision as a defense because 1) indemnity is a specific cause of action and Giffels had not filed a counterclaim, 2) the indemnification provision indicated that it applied only under limited circumstances, and 3) the exclusionary clause in the provision barred indemnification for this action because ABC's complaint raised allegations of Giffels' sole negligence.

The trial court denied Giffels' motion to vacate and entered judgment on the award. The trial court explained that it believed the arbitrator considered the issue of the indemnification provision, inasmuch as the arbitrator asked for additional briefing on the matter. With regard to the reason the arbitrator may have awarded ABC damages in spite of the indemnification provision, the trial court explained:

> The arbitrator's decision can be interpreted to mean that some of the damage was the result of the sole negligence of [Giffels], and he therefore awarded damages for that negligence.
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> Just because [ABC] caused some of the damage does not mean that [Giffels] was not the sole cause of some damage as well, at least the arbitrator could have so-found [sic].
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> And as the [*Detroit Auto Inter-Insurance Exchange v Gavin*, 416 Mich 407; 331 NW2d 418 (1982)] case cited by one of the attorneys here provides ["]arbitration, by its very nature, restricts meaningful legal review in the traditional sense. . . . In many cases the arbitrator's alleged error will be as equally attributable to alleged ['] unwarranted['] factfinding as to asserted ['] error of law['] In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable["]
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> So for all those reasons I cannot find that the arbitrator exceeded his powers, and I am going to deny the motion.

II. Arbitration Award

A. Standard Of Review

We review de novo a trial court's decision to enforce, vacate, or modify an arbitration award.[3]

B. Legal Principles

A court may vacate an arbitration award if the arbitrator exceeded his powers.[4] "[A]rbitrators can fairly be said to exceed their power when they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law."[5]

C. Applying The Law

Giffels contends that this Court must vacate the arbitration award because of the indemnification provision, which required ABC to indemnify Giffels against any liability arising from damage of any property arising out of or in connection with the performance of any work relating to the subcontract, based on any act or omission of "any other person or persons," but excluding those matters "in which the claim arises out of allegations of the sole negligence" of the owner, Giffels, the general contractor or any of their respective agents, servants and employees. The arbitration award states that it was "likely that some damage was done by" ABC. According to Giffels, because the arbitrator found that Giffels did not solely cause the damage, it was entitled to indemnification from ABC and that ABC was not entitled to recover from Giffels.

This Court's decision in *Hayman Co v Brady Mechanical, Inc*,[6] is instructive. There, the trial court vacated an arbitration award because it concluded that the arbitrator ignored, or considered and disregarded, a provision in the parties' contract. This Court explained that while it was possible that the arbitrator ignored the provision, there were other explanations for the arbitrator's result.[7] According to this Court, the actual reason for the arbitrator's result was not important; "[t]he point is that the trial court's theory was not the only available explanation for the arbitration award rendered below."[8] The Court concluded that, "[w]hether the arbitrator did

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[3] *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

[4] MCR 3.602(J)(1)(c); *Dohanyos v Detrex Corp*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996).

[5] *Detroit Auto Inter-Insurance Exchange v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982).

[6] *Hayman Co v Brady Mechanical, Inc*, 139 Mich App 185, 190-192; 362 NW2d 243 (1984).

[7] *Id*. at 191.

[8] *Id*. at 192.

in fact commit a substantial legal error was not evident without 'scrutiny of intermediate mental indicia', and [the] motion to vacate the award . . . should not have been granted."[9]

In the present case, the arbitration award does not disclose the arbitrator's conclusions concerning the applicability of the indemnification provision. The trial court proposed one basis on which the arbitrator may have rejected the applicability of the indemnification provision, and Giffels claims that the basis advanced by the trial court was mistaken. However, the arbitrator may have disregarded the indemnification provision for other reasons, for example, under the circumstances of this contract, the parties did not intend ABC to indemnify Giffels for its' own negligence.[10] ABC also suggests other paths that the arbitrator may have followed in reaching his decision, but we express no opinion on the merits of these points. The critical point here, as in *Hayman Co*, is that the type of legal error that will warrant judicial intervention must be "evident without scrutiny of intermediate mental indicia."[11] Speculation that the award was the product of faulty legal reasoning is inadequate. Therefore, because a legal error was not evident from the face of the arbitration award, we conclude that the trial court properly denied Giffels' motion to vacate the award.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

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[9] *Id*.

[10] See *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596-599; 513 NW2d 187 (1994) (wherein this Court, after concluding that a similar indemnification provision was unambiguous, further examined whether the parties intended the provision to apply to the indemnitee's own negligent acts).

[11] *Gavin*, *supra* at 429.