

/TRIAL REPORT

... does not include language allowing a breaching party to recover attorney fees for successfully defending a claim for actual damages. There is also no language requiring a non-breaching party, who fails to publish actual damages, to forego reasonable attorney fees incurred in establishing a breach. Therefore, we find that the arbitrator's interpretation allowing recovery of attorney fees to a prevailing party was not a reasonable one.

Consequently, the arbitrator exceeded his authority by considering each company's status as a prevailing party in determining attorney fees and ultimately concluding that Natare, as the non-breaching party, could not recover attorney fees. We therefore disagree with RenoSys's characterization of this error as a mere legal error for which there is no right to judicial review. While the legal position is sound, it simply does not justify this case for the reason that the arbitrator limited the arbitrator's authority concerning attorney fees by including a fee-splitting provision within the agreement. See *City of E. Chicago, Ind. v. E. Chicago Federation of Teachers, Local No. 511, A.F.T.*, 422 Ind. 2d 656, 662 (Ind. Ct. App. 1981)

Based on the foregoing, we find that the court erred by denying Natare's Motion to Vacate or Modify the arbitrator's award.

... counsel of record for certain plaintiffs in a personal injury lawsuit in Jasper Superior Court. As counsel of record, he personally was involved in the initial case management conference and also personally appeared at the final trial conference. However, he did not personally attend to or handle certain case activities that occurred between those two events, including depositions of witnesses. Nor did he attend the mediation session that eventually resulted in the final settlement of the case. His lawyer in his office appeared for him on behalf of his clients.

... the lawyer who did appear and represent the plaintiffs at both the deposition and the mediation session was Nick Zotos. He is a lawyer authorized to practice law in Michigan and also admitted to practice before the U.S. District Court for the Northern District of Indiana and before the Seventh Circuit Court of Appeals. But, he is not licensed to practice law in Indiana. Zotos had previously worked for a Chicago law firm where he handled depositions and discovery matters for the firm throughout the country. He did this while he was only licensed to practice law in Michigan. Hughes was "well aware of Zoto's credentials and employment history at the time he hired him and allowed him to engage in the trial activities mentioned," according to the deposition documents.

... Hughes listed Zotos on the firm's letterhead as one of the three "Attorneys at Law" without a disclaimer limitation beside his name, and in an e-mail message on the law office's answer-machine listed Zotos as one of the office's

The arbitrator exceeded his power by considering each company's status as a prevailing party in determining attorney fees and ultimately concluding that Natare, as the non-breaching party, could not recover attorney fees. As a result, the issue of a reasonable attorney fee, to which Natare was entitled, was not submitted to or considered by the arbitrator. Given this circumstance and that the arbitrator's award can be corrected without affecting the merits, we remand with instruction for the Arbitrator to determine Natare's attorney's fees.

"We reverse and remand for proceedings consistent with this opinion."

TRIAL REPORT

■ **Trial Reports:** Reports on recent Indiana cases from the lawyers and judges involved.

Automobile collision

David Sullivan v. Anonymous Trucking Co. (anonymous per confidentiality agreement)

Pre-suit mediation

Injuries: Hip reconstruction with subsequent hip replacement and ankle fracture

Date: April 13, 2005

Judge: Pre-suit mediation conducted by Kent Stewart, The Mediation Group

Disposition: Settled at pre-suit mediation for \$700,000

Plaintiff Attorney: Steven M. Crell, Cohen Garelick & Glazier

Defendant Attorney: Thomas S. Ehrhardt, Bokota Ehrhardt McCloskey Wilson & Conover

Insurance: ACE Insurance Co., administered by Gallagher Bassett Services


Case Information: David Sullivan was struck in his automobile by a waste-hauling truck, causing serious injuries to his hip and ankle. An attempt to reconstruct the hip was unsuccessful so a subsequent hip replacement was necessary. Repair of the ankle fracture was delayed to allow Sullivan to remain ambulatory so the hip replacement could properly heal.

Sullivan's work as a security guard was affected by his injuries. The restrictions on his mobility caused the loss of his deputy certification, and he consequently had to take work assignments for which such certification is not required. He will likely never regain the certification, which requires him to pass a rigorous agility test, and thus Sullivan claims a permanent loss to his earning capacity.

Sullivan's medical expenses were approximately \$125,000, and his lost wages were approximately \$17,500.

This case is a great example of the value of pre-suit mediation and other alternative dispute resolution mechanisms. Counsel and the parties worked long and hard with the mediator to reach a fair compromise of the claim, without the need for costly and time-consuming litigation. Attorneys should be encouraged to explore settlement options before filing suit, even in large and seeming complicated claims. Such an approach not only saves time and money for the parties involved, but also assists in keeping the courts open for those who need them and helps promote a more positive image of the legal profession.

— Steven M. Crell



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