

# INDIANA LAWYER

VOL. 16 NO. 23 • JANUARY 25 - FEBRUARY 7, 2006

## Arbitration arguments

High court hears allegations that arbitrator did not follow agreement.

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An arbitrator essentially rewrote a contract by failing to award attorney fees called for under the agreement, according to an attorney whose client was the target of disparaging remarks by a business competitor.

The arbitrator was obligated to determine reasonable attorney fees once he concluded such remarks were made, attorney David E. Wright told the Indiana Supreme Court during arguments Jan. 11 in one of the first cases in the state to address an arbitrator's alleged failure to follow an agreement as grounds to modify an award.

Wright, of the Indianapolis firm Kroger Gardis & Regas, asked the high court to follow the lead of the Indiana Court of Appeals, which ruled Aug. 24 that the arbitrator in the case exceeded his power.

"This case is about the credibility of the arbitration process and the public's confidence in it as a credible form of dispute resolution," argued Wright, representing Natare Corp.

The parties – national competitors in the business of manufacturing and selling swimming pool liners – have been involved in protracted litigation since 1989 when Michael T. Walsh, president of Natare, sought an injunction to prohibit Stewart J. Mart from making disparaging remarks about his company.

Mart is president of Duraplastec Systems, doing business as DSI, and Aquatic Renovation Systems, doing business as ARS – collectively RenoSys.

Further litigation ensued between the two in 1996. To lessen costs and expenses associated with both actions, Walsh and Mart entered into a settlement agreement in 1998.

The parties agreed not to make disparaging remarks about the other. The agreement called for any future disputes to be submitted to an arbitrator who would enter a binding decision as to whether a breach had occurred.

If a breach were established, the non-breaching party was entitled to \$5,000 in liquidated damages under the agreement and was permitted to attempt to establish actual damages, as well. The agreement also awarded reasonable attorney fees incurred by the non-breaching party in enforcing the agreement.

The parties entered into arbitration in September 2002, with Natare claiming RenoSys had caused it to lose a project in Colorado by disseminating disparaging statements about Natare and its products. The parties stipulated that had Natare performed the contract, it would have earned a profit of \$45,000.

The arbitrator entered an award Jan. 14, 2004, in which he concluded that RenoSys had disseminated the disparaging materials, but it had not caused Natare to lose the project. A representative of the engineering firm overseeing the project was biased against Natare before bids were ever solicited, the arbitrator concluded.

He awarded Natare \$5,000 under the liquidated damages provision of the arbitration agreement for establishing a breach, but denied Natare's request for \$45,000 in actual damages. The arbitrator further concluded that neither party could recover attorney fees.

Natare filed a motion in Marion Superior Court April 13, 2004, to vacate, or in the alternative, modify the arbitration award because the arbitrator failed to award attorney fees after finding Natare had established a breach.

The trial court denied the motion, and Natare appealed.

The Court of Appeals reversed and remanded to the arbitrator to determine attorney fees. The Supreme Court has assumed jurisdiction over the case, however, vacating the Court of Appeals ruling.

Wright told the justices that while the arbitrator had discretion to deny actual damages, he did not have discretion to deny attorney fees because he had determined a breach of the settlement agreement had occurred.

"Suppose he had awarded reasonable attorneys fees of \$1," Justice Frank Sullivan Jr. asked. "Would we still be here?"

On that point, the arbitrator would also have great discretion, and it would be difficult for Natare to argue against such an award, Wright responded, but instead the arbitrator said the parties were "not entitled" to attorney fees.

"That's the point," Wright said. "That was not an option."

The arbitrator did not hear any evidence concerning fees, such as the hours attorneys spent proving the breach, and whether that work was reasonable.

"There was nothing to prevent Natare from presenting evidence concerning attorney fees or entitlement of attorney fees," countered RenoSys attorney Brent D. Taylor.

Despite the fact the arbitrator had said he would give the parties information on briefing the fee issue if he determined a breach had occurred, he found a reasonable fee under the circumstances was no award at all, said Taylor of Baker & Daniels.

"The dominant claim, in my opinion, the only claim presented from start to finish was the claim of \$45,000 in actual damages, which in itself failed," he said.

Natare had to prove a breach in order to prove those damages, Taylor said. It was merely one element to the claim. Natare didn't have to spend one extra dollar to prove the breach, he said.

This case is not about the credibility of arbitration, Taylor argued. It is about its "viability," he said.

An arbitrator's ruling should be more deferential than a court's review of a jury ruling or that of agency guidelines, Taylor said.

The rules in affect at the time the agreement was undertaken gives an arbitrator sweeping discretion in interpreting a contract, he said.

"I think that's what parties bargain for when they enter arbitration," Taylor said, "that a neutral will be making a ruling."•