

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: August 2, 2016]

UNION MUTUAL FIRE INSURANCE :  
COMPANY :

V. :

C.A. No. PC 2013-1620

ANTHONY AND SUSAN PATE :

**DECISION**

**LANPHEAR, J.** This matter came on for hearing before Mr. Justice Lanphear on July 14, 2016 on Defendants’ Motion for Confirmation of Appraisal Award, Plaintiff’s Motion to Vacate and or to Modify the Appraisal Award, and Defendants’ Motion for Entry of Final Judgment.

**I**

**Facts and Procedure**

On August 16, 2003, a hot water storage tank in the basement of Mr. and Mrs. Pates’ home ruptured. Valuable baseball cards were stored in cardboard boxes directly on the floor and on wooden slabs in the basement. Mr. Pate waited a day to contact the insurance agent, and on the next day (August 18, 2003), left a voice message and indicated he was about to embark on a road trip.

Union Mutual Fire Insurance Company (Union Mutual) contends they received notice for the first time on September 3, 2003. Union Mutual hired Pelletier & Rourke Inc. on September 4, 2003, who inspected the property on September 16, 2003. At the inspection, Mr. Gorman of Pelletier & Rourke Inc. observed visible water damage to the boxes containing the baseball cards. He also noted that a number of the cardboard boxes were still damp or wet. In December 2003, Mr. and Mrs. Pate claimed a loss and submitted an estimate for \$1,281,552.25.

On February 15, 2005, Union Mutual sent Mr. and Mrs. Pate a letter advising that it would arrange an appraisal of the items that sustained water damage and were the subject of the claim. The appraisal was conducted and on December 29, 2005, Union Mutual forwarded a copy of its expert's report to Mr. and Mrs. Pate and asked for a response.

Union Mutual filed a complaint with the Rhode Island Superior Court on April 5, 2013<sup>1</sup> seeking a Declaratory Judgment outlining the respective rights and duties of each party with regard to the insurance policy at issue; a declaration that the appraisal requirement was barred by the statute of limitations; and a declaration that any recovery under the policy was barred by the statute of limitations as outlined in G.L. 1956 § 27-5-3. Mr. and Mrs. Pate counterclaimed with several counts, including a request for declaratory judgment that the insurer's defenses were waived.

Meandering slowly at the prelitigation stages, the case kept a low throttle thereafter. Although each party requested a declaratory judgment, the case continued unresolved. In June of 2014, a motion to accelerate was granted, but discovery motions ensued. It was listed as ready trial in January 2015, but was delayed to allow further discovery. In an attempt to move the case along, the Court listed the case as ready trial after April 1, 2015 in an attempt to move it along and assigned it to a trial justice. In spite of the trial justice's valiant efforts, the case made no significant progress. The case was set for a trial date of June 1 and 2, 2015. After several conferences and hearings, the trial justice saw few, if any, remaining genuine issues of material fact in dispute and suggested new motions for summary judgment. Cross-motions for summary judgment were filed by the parties in October of 2015. In a bench decision, the trial justice ruled in favor of Mr. and Mrs. Pate finding that Union Mutual's remaining defenses concerned the

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<sup>1</sup> There is little explanation of what caused the ten year delay. A copy of the policy was requested in 2008, but the claim slowed to a crawl.

amount of loss rather than bars to recovery. The Court ordered the parties into the appraisal process pursuant to the terms and provisions of the applicable policy stating:

“The question of damages shall be submitted to the appraisal process. During the appraisal process, any evidence concerning Pates’ alleged failure to comply with the subsection 2(d)(1) will be limited to the efforts they reasonably could have and should have taken up to the time when UM reasonably could have commenced its investigation had its agent and adjuster acted diligently, that is no more than three or four days after the Pates discovered the initial flooding.” Hr’g Tr. 31:24-32:7, Oct. 26, 2015.

At the hearing, counsel for Mr. and Mrs. Pate asked the Court to specify that the appraiser separately calculates pre-award interest, and the Court did so. Tr. 35:14-20. The trial justice also agreed that although she had ordered final judgment to enter, she would delay entry until the appraisal was completed. Tr. 36:1-23.

The policy required that the insurer and insured each select an appraiser and that they mutually select a neutral umpire. Defs.’ Mot. For Entry of Final J., Ex. E at 11. Mr. and Mrs. Pate designated Robert Connolly of Binghamton, New York and Union Mutual designated Fred Winer of Baltimore, Maryland. Mr. Connolly and Mr. Winer agreed upon Roger Durkin of Durkin Valuation Consultants of Boston, Massachusetts to be the neutral Umpire. Mr. Durkin sent a proposed engagement letter to the parties dated October 8, 2015 concerning the exact nature of his services and a proposed appraisal process. In this letter, Mr. Durkin explained that there would be no personal inspection of the property, unless required. Union Mutual requested that Mr. Durkin meet their appraiser, Fred Winer, and expert, Mr. Kathenes, onsite to do an

inspection. Mr. Durkin declined to meet with the appraiser or allow for an inspection and suggested the parties go back to Court to seek an order on the appraisal process.<sup>2</sup>

Mr. and Mrs. Pate requested the court's intervention in a letter dated January 16, 2016 (Pl.'s Mem. Ex. M, May 13, 2016). Union Mutual formally requested instruction on the appraisal process in its motion of February 6, 2016, and suggested that Mr. Durkin be replaced.

The trial justice, by an Order dated March 22, 2016, denied the request to disqualify Mr. Durkin as the Umpire. With the case still drifting, and counsel feuding over each procedural step, the Court provided specific instructions on the appraisal process: 1) Union Mutual will submit the complete reports of Mr. Winer and Mr. Kathenes to the appraisers and the Umpire; 2) the appraisers will separately set the amount of the loss; 3) if the appraisers agree, then that will be the loss awarded to the Pates; 4) if the appraisers disagree on the amount, they must submit their differences to the Umpire who will decide the amount of the loss; 5) the appraisal process will be conducted according to the Uniform Standards of Professional Appraisal Practice (USPAP); 6) the parties are prohibited from providing submissions or argument to the Umpire and appraisers unless specifically requested and agreed upon by a majority vote; and 7) the parties are prohibited from further inspection of the Pates' property unless requested and agreed upon by a majority vote. (Order 1-2, Mar. 22, 2016.)

In accordance with the Order, Mr. and Mrs. Pate sent an appraisal to Mr. Durkin. Union Mutual sent the appraisal report of Mr. Kathenes to Mr. Durkin in early March 2016. Mr. Durkin and Union Mutual engaged in various communications seeking Mr. Kathenes' work

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<sup>2</sup> It is unlikely that the appraisers were selected for their knowledge of the law, rather than their expertise in appraising. They were based in three separate states, not in Rhode Island. Clearly, they wished to avoid protracted challenges to their procedure.

product and Mr. Winer's appraisal report; however, Mr. Winer never submitted a report. On April 1, 2016, Mr. Durkin emailed the parties with an "Umpire Status Report."

On April 5, 2015, Mr. Durkin emailed his "Neutral Umpire Report." He determined that the loss was \$400,000 and pre-award interest amounted to \$588,000 (147%). Mr. and Mrs. Pate moved to confirm this award. Union Mutual seeks to vacate the award.

## II

### Standard of Review

Judicial review of an appraisal award is governed by the same rules for reviewing an arbitration award. See Grady v. Home Fire & Marine Ins. Co., 27 R.I. 435, 63 A. 173, 174 (1906); Waradzin v. Aetna Cas. & Sur. Co., 570 A.2d 649, 650 (R.I. 1990) ("This court has recognized that an 'appraisal' procedure can be equated with 'arbitration.'"). In the case of arbitrations, the Court can only vacate an award in certain limited circumstances. See Wheeler v. Encompass Ins. Co., 66 A.3d 477, 480 (R.I. 2013). G.L. 1956 § 10-3-12 provides:

"In any of the following cases, the court must make an order vacating the award upon the application of any party to the arbitration:

"(1) Where the award was procured by corruption, fraud or undue means.

"(2) Where there was evident partiality or corruption on the part of the arbitrators, or either of them.

"(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in hearing legally immaterial evidence, or refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been substantially prejudiced.

"(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Sec. 10-3-12.

In addition to the above-stated reasons, the Court can also vacate an award "when the award is irrational or if the arbitrator 'manifestly disregarded the law.'" Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 802 (R.I. 2002).

The Court can modify an arbitration award in other limited circumstances. See Pierce v. R.I. Hosp., 875 A.2d 424, 427 (R.I. 2005). Section 10-3-14 provides:

“(a) In any of the following cases, the court must make an order modifying or correcting the award, upon the application of any party to the arbitration:

“(1) Where there was an evident material miscalculation of figures, or an evident material mistake in the description of any person, thing, or property referred to in the award.

“(2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

“(3) Where the award is imperfect in matter of form not affecting the merits of the controversy.

“(b) The order must modify and correct the award, so as to effect the intent thereof and promote justice between the parties.” Sec. 10-3-14.

However, in reviewing an arbitration award, the Court must be mindful that “the role of the judiciary in the arbitration process is ‘extremely limited.’” Pierce, 875 A.2d at 426 (quoting Purvis Sys., Inc. v. Am. Sys. Corp., 788 A.2d 1112, 1114 (R.I. 2002)). Moreover, “arbitration awards enjoy a strong presumption of validity given the ‘strong public policy in favor of the finality of arbitration awards.’” Id. (quoting Prudential Prop. & Cas. Ins. Co. v. Flynn, 687 A.2d 440, 441 (R.I. 1996)).

Thus, in order to affirm an arbitration award, pursuant to § 10-3-11,

“At any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award, and thereupon the court must grant the order confirming the award unless the award is vacated, modified or corrected, as prescribed in §§ 10-3-12 – 10-3-14. Notice in writing of the application shall be served upon the adverse party or his or her attorney ten (10) days before the hearing on the application.” Sec. 10-3-11.

It follows that “an order confirming an arbitration award must be granted unless the award is vacated, modified or corrected, as prescribed in §§ 10-3-12 – 10-3-14. Desjarlais v. USAA Ins.

Co., 818 A.2d 645, 647 (R.I. 2003) (internal quotation marks omitted). As such, “[A]bsent a manifest disregard of a contractual provision or a completely irrational result, the [arbitration] award will be upheld.” Id. (quoting Town of N. Providence v. Local 2334 Int’l Ass’n of Fire Fighters, AFL-CIO, 763 A.2d 604, 606 (R.I. 2000)).

### **III**

#### **Analysis**

There are few issues remaining in the present case. Two justices previously ruled on summary judgment motions in this case. The trial justice granted summary judgment and determined that the only questions remaining were the amount of loss and whether or not Mr. and Mrs. Pate made reasonable and necessary repairs before the claims adjusters got involved in the case. Summ. J. Hr’g Tr. 31:15-32:7, Oct. 26, 2015. At the summary judgment hearing, the justice ordered pre-award interest in addition to the judgment. Id. at 35:14-36:12.

Subsequently, at the appraisal instruction hearing, the trial justice clearly articulated that this was not a contested arbitration hearing and that Union Mutual could not expand the legal issues or arguments before the Umpire. Hr’g Tr. 9:3-23, Feb. 25, 2016.

### **A**

#### **Process and Evidence**

Union Mutual argues that it should have been able to present arguments and evidence before the Umpire, and by not being able to do so, Union Mutual was deprived of a fair award. Further, Union Mutual disagrees with the trial justice’s ruling that the parties were not to make arguments or further submissions to the Umpire to again inspect the property.

The trial justice addressed each of these issues in previous hearings in this case. The trial justice noted at the hearing for the appraisal order that Mr. Winer never inspected the sports

collection and that Mr. Kathenes did. Hr'g Tr. 3:5-10, Feb. 25, 2016. She further explained that Union Mutual mistakenly considered this appraisal as an arbitration. Id. at 4:4-12; 9:3-9. She explained that Union Mutual tried to transform the simple appraisal process into a complex proceeding and reopen issues and arguments already determined in her summary judgment order. Id. at 6:13-25. The trial justice limited the issues before the Umpire. Id. at 9:21-23. Specifically, the Court maintained that Union Mutual could show that Mr. and Mrs. Pate failed to mitigate their damages. Id. at 10:18-11:8. Thus, Union Mutual did have the ability to submit evidence of a failure to mitigate even though the Order states that the parties are prohibited from providing submissions and arguments. Id. at 12:3-10. At the very least, Union Mutual should have requested to submit evidence and could have sought judicial intervention if the appraisal panel declined.

When a case has already had matters determined, the law of the case doctrine controls. The law of the case states, "after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling." Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 677 (R.I. 2004). Because the trial justice addressed the questions currently before the Court in her February 25, 2016 bench decision and March 16, 2016 Order, the law of the case doctrine applies. The trial justice's decision was not clearly erroneous, as shown by a careful reading of both her bench decision and order, which shows they are not in opposition to one another. As such, the Court does not need to reach the issue again.

## **B**

### **Impartiality**

Union Mutual contends that the award must be vacated because the Umpire was impartial or biased to it. The Court may vacate an arbitration when the challenging party establishes “a reasonable impression of partiality.” V.S. Haseotes & Sons, L.P. ex rel. Bentas v. Haseotes, 819 A.2d 1281, 1285 (R.I. 2003). The standard requires the challenger of an arbitration to “show[] more than an appearance of bias but less than actual bias.” Haseotes, 819 A.2d at 1285. The challenger must show “a causal nexus between the impropriety and the arbitration award.” Id. “[P]artiality is established when ‘a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.’” Id. (quoting Aetna Cas. & Sur. Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991)); McGinity v. Pawtucket Mut. Ins. Co., 899 A.2d 504, 507 (R.I. 2006).

In the present case, Union Mutual has not met its burden of proving that the Umpire was partial or that partiality tainted the award. Union Mutual presented no evidence or argument suggesting this resulted in the report being biased. Union Mutual contends that Mr. Winer never submitted his report, which meant that Union Mutual was not represented in the appraisal process. However, the Umpire had before him Mr. Kathenes’ report and file related to the creation of that report. The Umpire’s task was limited by the guidelines of the prior court orders. Union Mutual failed to show “a causal nexus between the impropriety and the arbitration award.” Haseotes, 819 A.2d at 1285.

## C

### **Prejudgment Interest**

Rhode Island allows an arbitrator to determine prejudgment interest, unless the policy specifically provides otherwise. Waradzin v. Aetna Cas. & Sur. Co., 570 A.2d 649, 651 (R.I. 1990); Mangiacapra v. Sentry Ins. Co., 517 A.2d 1041, 1042 (R.I. 1986). In this matter, however, the trial justice made a preliminary determination that prejudgment interest would accrue, and when it would accrue. That determination was within the court's scope of authority.

Moreover, in this case, prejudgment interest is proper because the policy did not provide otherwise. See Waradzin, 570 A.2d at 651. The trial justice at the summary judgment hearing ordered the arbitrator to calculate prejudgment interest, making it the law of the case. See Chavers, 844 A.2d at 677. Indeed, the issue was not truly complex, as G.L. 1956 § 9-21-10 provides that prejudgment interest should be awarded from the date of the cause of action. A cause of action accrues on the date of injury. See Metro. Prop. & Cas. Ins. Co. v. Barry, 892 A.2d 915, 924 (R.I. 2006) (“Thus, we are of the opinion that an insured ‘is legally entitled to collect’ prejudgment interest from the date the cause of action accrues, which we hold is the date of the injury.”). In this case, the date of the injury was the day the hot water heater ruptured. As such, the prejudgment interest date was properly calculated.

## D

### **The Trial Justice Reasonably Controlled the Progress and Process**

Months after this case was referred to the trial justice as ready trial and an accelerated case, the parties insisted on questioning the procedural authority of the appraisal process and the Court. In the fall of 2015, motions were being filed. In January of 2016, the Umpire skirted procedural questions prompting counsel to seek the intervention of the trial justice relative to the

process. (Union Mutual’s Mem. 22-23, May 13, 2016). The trial justice acted, bringing order to the thirteen years of procedural discord and delay, and sheparding the matter to a prompt conclusion.<sup>3</sup>

Not only does Rule 16 of the Superior Court Rules of Civil Procedure authorize the trial justice to frame the dispute, but each of the parties had invoked the Court’s broad jurisdiction. Each of the parties sought a Declaratory Judgment from the Court in their initial pleadings. Union Mutual also requested that “This Court afford any and all other relief as necessary.” Compl. 8, Apr. 5, 2013. Mr. and Mrs. Pate also prayed for broad relief in their three count counterclaim which prayed for “all other and further relief as may be proper under the circumstances.” Answer 12, Apr. 30, 2013.

#### IV

#### Conclusion

Appraisals are affirmed by the Court pursuant to the same statute as arbitrations. The Court gives deference to arbitrator’s decisions and must confirm the award except in very limited circumstances. This Court finds that none of the circumstances required to vacate or modify an appraisal award, as set out in §§10-3-12 and 10-3-14, are present in this case. Moreover, the

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<sup>3</sup> The trial justice’s actions were consistent with the clear directive of our high court:

“Moreover, the entire thrust of § 27-5-3—the provision governing the format of fire insurance policies—and in particular, its requirement that these policies contain an appraisal clause, is to ensure speedy and efficient resolution of claims. Allstate’s attempt to circumvent the appraisal process in favor of litigation not only delays resolution of these claims but can have the effect of forcing its policyholders to make difficult choices. Faced with the prospect of costly and time-consuming litigation, policyholders might choose to accept a low settlement offer rather than undertake litigation. Such a result is unacceptable.” Hahn v. Allstate Ins. Co., 15 A.3d 1026, 1030 (R.I. 2011).

issues raised by Union Mutual were addressed and ruled upon by the trial justice. The law of the case doctrine applies to those rulings.

After review of the pleadings, the Court finds that the November 9, 2015 Order resolves all of the claims raised in the Complaint, the Counterclaims and the Answers. The Court delayed entry of final judgment merely to ensure that the appraisal process was completed. Final judgment is therefore appropriate.

Defendants' motion to confirm the appraisal award is granted. Plaintiff's motion to vacate and or to modify the appraisal award is denied. Defendants' motion for entry of judgment is granted. Counsel for Defendants shall submit an appropriate final judgment forthwith.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Mutual Fire Insurance Company v. Anthony and Susan Pate Union

**CASE NO:** PC-2013-1620

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** August 2, 2016

**JUSTICE/MAGISTRATE:** Lanphear, J.

**ATTORNEYS:**

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