

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

- - -

TELLKAMP,
Plaintiff,

File No. 93-84423-CK

-VS-

OPINION

WOLVERINE MUTUAL,
Defendant.

STENOGRAPHIC RECORD

of the proceedings had in the above-entitled cause in
said court on the 17th day of June, 1994, at about the
hour of 10:30 a.m., before the HONORABLE ROBERT A. BENSON,
Circuit Judge.

APPEARANCE:

R. KEVIN THIEME, PC
MR. R. KEVIN THIEME (P34831)
220 Lyon Street, #560
Grand Rapids
Michigan 49503-2210
(616) 451-8596

BARBARA WILES REPORTING
By: Barbara Lynn Wiles -- #4288
Certified Shorthand Reporter
14179 Hanna Avenue, N.E.
Cedar Springs, MI 49319
(616) 696-0502

I N D E X

WITNESSES:

(None)

EXHIBITS:

(None)

1 Grand Rapids, Michigan
2 Friday, 17 June 1994
3 At about the hour of 10:30 a.m.

4 R E C O R D

5 THE COURT: Let the record reflect -- I'm
6 going to have Mr. Thieme put something on the record in a
7 minute. This matter was set for a hearing today. The
8 Court spent a lot of time yesterday, a couple hours
9 yesterday, getting prepared for the motion today.

10 Mr. Dale Strain, Jr. is not here. It's
11 now 10:30, and we can't raise him by phone because for
12 some reason their office is closed because of a shutdown
13 air conditioner.

14 I think you had talked to him, Mr. Thieme?

15 MR. THIEME: I did. For the record, Your
16 Honor, I talked to Mr. Strain yesterday. He had called me
17 up and wanted to know if he could have this motion heard
18 at 11:00. I indicated to him I had an 11:45 meeting. His
19 concern was that we would be sitting around the courtroom
20 because the Court's schedule is sometimes very busy. I
21 told him I would arrive over at the court at 9:00 a.m. to
22 insure that we would be one of the first to be heard, and
23 he had no problem with that. I have since tried to call

1 his office and have not been able to get through, having
2 gotten a recording indicating that the office is shutdown.

3 THE COURT: My Clerk tried to call too and
4 got the same message. Do you think he's planning on
5 showing up at 11:00?

6 MR. THIEME: I would not think so given
7 the fact that I told him I would get the case up at 9:00
8 and I would be here at 9:00 so we could have it heard in
9 the morning, plus the fact that I told him I couldn't do
10 it late.

11 THE COURT: What the Court wants to do,
12 the Court is going to give an opinion without any argument
13 on this case. Both parties have filed rather extensive
14 briefs, rather good briefs. I'm not going to let Mr.
15 Thieme argue when Mr. Strain cannot argue. The Court
16 Rules, and I forgot which Rule it is, does provide that
17 the Court can, if it chooses to do so, give an opinion
18 without oral argument, so I'm not going to let Mr. Thieme
19 speak. I will go ahead and give my opinion based upon the
20 briefs.

21 What I will do is when we get done you'll
22 have to type up a copy of this opinion and I'll send one
23 both to Mr. Thieme and to Mr. Strain.

24 This is a case, very briefly, in which
25 there was an arbitration in connection with an Uninsured

1 Motorist Clause involving a policy between the plaintiff
2 and Wolverine, the defendant. The matter went to
3 arbitration. Two of the arbitrators set the figure at
4 \$150,000. The third arbitrator dissented. Now, kind of
5 extra the record, de hors the record, as we say, the
6 defendant tells me the other arbitrator set it for
7 \$20,000; however, that doesn't appear in the arbitration
8 award. The arbitration award is \$150,000 with one
9 dissent.

10 Under the provisions of the Wolverine
11 policy, there's some argument in there as to whether any
12 of this is binding or whether it's binding only as to
13 liability, not as to damages. Wolverine takes the
14 position because of a clause that says that if the
15 arbitration award comes back for more than the statutory
16 minimum required by the financial responsibility law,
17 either side can ask for a trial.

18 At the time that this was entered the
19 statutory rate for financial responsibility was \$20,000.
20 Wolverine, therefore, takes the position that the
21 arbitration award is a nullity, that either side can ask
22 for and receive a trial on all of the issues. The
23 plaintiff in this case is asking the Court to enter what
24 they call a summary disposition based on the arbitration,
25 or, in the alternative, to determine that the liability

1 issue has been precluded and that the only issue at the
2 trial would be the question of the damages.

3 As I say, both parties filed briefs. I
4 have read the briefs, I have read quite a few of the
5 cases. I have read particularly the one relied on mostly
6 by Wolverine, which is Roe v Amica Mutual Insurance
7 Company, 533 SO 2d 279, which is a 1988 case out of
8 Florida.

9 I'm going to treat the filing by the
10 plaintiff as a motion to enter judgment on the arbitration
11 award, and I'm going to enter judgment on the arbitration
12 award, and I'm going to enter judgment in the amount of
13 \$150,000 on the arbitration award. I'm not going to get
14 into the hassle of whether or not this violates public
15 policy. I'm not going to get into the argument that some
16 of the courts get into as to whether or not this type of
17 clause favors the insurance company and is unfair to the
18 insured. I'm not going to get into the argument as to
19 whether this is an adhesion contract and all of those
20 various esoteric arguments that the cases from other
21 states argue about.

22 Very simply, the Court thinks that this
23 arbitration clause, as worded, is violative of the
24 Michigan Statute on Arbitration, and for that reason has
25 to fall.

1 The Florida Statute that Wolverine relies
2 on is actually significantly different than the Michigan
3 Statute, and I think it's a difference which is of prime
4 importance. The Michigan Arbitration Statute, which is
5 MCL 600.5001 (2), provides for what we call statutory
6 arbitration, and it says this, in applicable part, it says
7 that any such agreement, talking about a statutory
8 arbitration agreement, shall be valid, enforceable, and
9 irrevocable. And I emphasize the word "irrevocable".
10 Then in the last sentence of the Michigan Statute, the
11 Michigan Statute says this: "Such an agreement shall
12 stand as a submission to arbitration of any controversy
13 arising under said contract not expressly exempt from
14 arbitration by the terms of the contract". The Florida
15 Statute, from which the Amica case is based, is
16 significantly different. The last sentence of the Florida
17 Statute says as follows: "Provided that this Act shall
18 not apply to any such agreement or provision to arbitrate
19 in which it is stipulated that this law should not apply
20 or to any arbitration or award thereunder". That's why
21 the Florida Court can say that what the parties did is
22 submit to binding arbitration under \$20,000 but it's non-
23 binding arbitration over \$20,000. Michigan doesn't say
24 that. Michigan says, "If you go to arbitration it's
25 binding. If you don't want to go to arbitration you

1 exempt it". In fact, one of the cases I read, and I think
2 it's the one in 438 Mich, 488, I think that's the one, but
3 one of the Michigan Appellate Courts talks about the fact
4 that, well, what you want to do is you say we will send
5 all agreements to arbitration except we will not arbitrate
6 coverage issues. In other words, what you have to do in
7 Michigan is exempt certain issues from going to
8 arbitration. What Wolverine did in this case is say,
9 "Well, we're going to arbitrate the issue". I don't think
10 you can -- No, excuse me. They send the case to
11 arbitration, and then what they want to say is, "Well,
12 it's going to be non-binding". I don't think you can do
13 that in Michigan. In Florida you can, because in Florida
14 what you do is you say, "We're going to agree that the
15 arbitration statute will not apply in certain
16 arbitrations". Michigan doesn't say that. Michigan says,
17 "If you arbitrate it you're bound. If you don't want to
18 arbitrate it you don't have to arbitrate it. You can pick
19 out issues you don't want to arbitrate". What happens
20 then, and the Michigan Statute is also rather clear, that
21 arbitrations under the Statute are to be governed by the
22 Michigan Court Rules, and the Michigan Court Rules give
23 the court a very limited choice. We can affirm the award
24 and enter judgment, we can vacate the award, and we can
25 vacate the award only on very very narrow ground, none of

1 which are alleged here.

2 Secondly, under the Michigan Court Rules,
3 if any party wants to move to vacate the award they have
4 to do it within 21 days. Wolverine has never filed a
5 motion to vacate the award. As I read the Michigan
6 Statute, the submission to arbitration is binding, it's
7 irrevocable. Wolverine cannot submit issues to arbitration
8 if the parties agree not to submit issues, but I don't
9 think Wolverine can do what they do here, which is to say,
10 "Well, we're going to arbitrate it, however, if we don't
11 like the results we're not going to be bound by it". I
12 don't think you can do that. In Florida you can because
13 in Florida what you can say is, "We're going to send it to
14 arbitration, but we're not going to be bound by the
15 arbitration statute".

16 I have no objection with the Roe case.
17 The Roe case is obviously decided under Florida Law. The
18 Florida Court said, "Well, you can have binding
19 arbitration under \$20,000. You can have non-binding
20 arbitration over \$20,000". The Michigan Statute does not
21 allow for non-binding arbitration. It allows for not
22 going to arbitration. It allows for not submitting issues
23 to arbitration. It does not say that you can have non-
24 binding arbitration. I think once you get an award,
25 unless there is fraud on the part of the arbitrators,

1 STATE OF MICHIGAN

2 SS

3 COUNTY OF KENT

4 I, Barbara Lynn Wiles, hereby certify
 5 that I am a Court Reporter for the Seventeenth Judicial
 6 Circuit of Michigan; that I reported the proceedings had in
 7 the aforementioned cause, and that the preceding pages
 8 represent a true and correct transcript of the proceedings
 9 had in said cause, on said date.

10 Barbara Lynn Wiles

11 Barbara Lynn Wiles -- CSR #4288

12 My commission expires: 11/23/96

13 29 June 1994

1 unless they obviously exceeded their authority under the
2 arbitration agreement and certain other things, we're
3 bound by it, so I'm going to treat this as a motion to
4 enter judgment on the arbitration award. I'm going to
5 enter judgment on behalf of the plaintiff for \$50,000 --

6 MR. THIEME: \$150,000, Your Honor.

7 THE COURT: Is it \$150,000?

8 MR. THIEME: Yes.

9 THE COURT: Excuse me, \$150,000. Yes,
10 excuse me, \$150,000, plus any interest and court costs
11 that either the Arbitration Court Rule provides for or
12 General Court Rule provides for.

13 I'm going to ask Mr. Thieme to prepare the
14 judgment.

15 MR. THIEME: Thank you, Your Honor.

16 (Whereupon proceedings concluded at about 10:45 a.m.)

17

-oOo-